TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 367

BROOKS-SCANLON CORPORATION, APPELLANT,

vs.

THE UNITED STATES

FILED JUNE 11, 1923

No. 385

THE UNITED STATES, APPELLANT,

vs.

BROOKS-SCANLON CORPORATION

FILED JUNE 23, 1923

APPEALS FROM THE COURT OF CLAIMS

(29,677) (29,695)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1923

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. 34464

BROOKS-SCANLON CORPORATION

vs.

THE UNITED STATES.

I. PETITION AND AMENDED PETITION

On March 13, 1920, the plaintiff filed its original petition. Subsequently, to wit, on June 12, 1920, by leave of court, the plaintiff filed its amended petition. Said amended petition is as follows:

II. AMENDED PETITION—Filed June 12, 1920

Amended Petition

To the Honorable, the Court of Claims:

1. Your claimant states that the East Coast Transportation Company, hereinafter named, was a corporation duly incorporated and existing under the laws of the State of Delaware, and that the Carpenter-O'Brien Company hereinafter named, was and is a corporation duly incorporated and existing under the laws of the State of Delaware, and that thereafter on the 8th day of December, 1917, the said Carpenter-O'Brien Company duly amended its articles of incorporation and such proceedings were duly had thereunder that the name and title of said Carpenter-O'Brien Company was thereby changed from the said name and title to the Brooks-Scanlon Corporation hereinafter named the claimant herein; and that the [fol. 2] New York Shipbuilding Company hereinafter named was and is a corporation duly incorporated and existing under the laws of the State of New Jersey; and that after the execution and delivery of the construction contract hereinafter described the said corporation duly transferred all of its rights and interests in and to the contracts and rights and interests thereunder to the New York Shipbuilding Corporation, described in the requisition notice hereinafter set forth, a corporation duly organized and existing under the laws of the State of New York.

2. That on the 28th day of March, 1916, the said East Coast Transportation Company as owner, duly entered into a contract in writing with the said New York Shipbuilding Company, as builder, whereby the said builder agreed to construct for the said owner or its assigns, in a workmanlike manner, a single screw steel cargo steamer, according to plans and specifications in said contract set

forth, to be delivered to said owner at the dock of the contractor and builder, at Camden, N. J., on or before the 1st day of February, 1918, and that in and about the performance of said contract, to obtain and supply therefor suitable materials, equipment and supplies, and employ suitable labor thereon, necessary to complete said contract; that thereafter such agreements were made for alterations and supplementary work thereon so that on the 25th day of May, 1917, the ship described in and deliverable under said contract should be of a tonnage of 8,597 dead weight tons. That by said contract it was further agreed that said builder should receive from the said owner as compensation for such work, materials, equipment, supplies and labor so obtained, furnished and utilized under said contract and for the construction of said ship as aforesaid, the full sum of eight hundred thirty-one thousand, five hundred dollars ($831,500) to be payable as follows: Five hundred and ninety-five [fol. 3] thousand dollars ($595,000) thereof to be paid by certain sums of cash payable at the signing and at the completion of said contract, and the remainder to be paid by monthly instalments of forty-five thousand dollars ($45,000) for each month for eleven successive months, beginning on the 1st day of March, 1917, and ending on the 1st day of January, 1918, of which twenty thousand dollars ($20,000) thereof should be cash and twenty-five thousand dollars ($25,000) thereof should be by a promissory note signed by the owner to the order of the builder, dated of the 1st day of the month of the issuance of the note, and due February 1, 1918, with interest thereon at the rate of five per centum (5%) per annum until paid, and in addition, forty thousand, five hundred dollars ($40,500) on delivery of said ship, payable fifteen thousand, five hundred dollars ($15,500) in cash, and twenty-five thousand dollars ($25,000) by a note payable February 1, 1918, dated on the day of delivery, of the same description, terms and bearing the same interest as said notes above described; and it was further agreed that all of said notes should be a first lien upon the said vessel, and, at maturity thereof, should be funded into serial coupon bonds of the denominations of one thousand dollars ($1,000) each, executed by said owner and payable to bearer, secured by first mortgage on said ship, bearing interest at the rate of 5 per centum, payable semi-annually, until paid, and fifteen thousand dollars ($15,000) of said bonds shall mature every six months thereafter, beginning six months from the date of said bonds, and ending in ten years from the date of said bonds; and further, in addition thereto, as compensation for said alterations and supplements to said ship as above stated, and as a further sum for increased labor costs thereon, and to enable the rate of interest on said bonds to be at the rate of five per centum (5%) per annum, the said owner agreed to pay to said [fol. 4] builder the further sum of two hundred thirty-six thousand, six hundred thirty dollars ($236,630), making the total amount to be paid to said builder from said owner under said contract, eight hundred thirty-one thousand, six hundred thirty dollars ($831,630) as above set forth, and as in said contract and supplements provided. That said owner had paid said builder up to and including the 3d

day of August, 1917, the sum of four hundred nineteen thousand, five hundred dollars ($419,500) of which two hundred thirty-nine thousand, five hundred dollars ($239,500) was in cash, at or about the times required by said contract and supplements thereto, and one hundred eighty thousand dollars ($180,000) was in the form of notes as above described. In addition thereto, the said owner had deposited funds to its credit in banks then and ever since solvent in sufficient amounts to be so held and paid to said builder for such cash payments herein described as they should become due under the terms of said contracts and supplements thereto, and that such deposits were thereafter retained for the performance by said owner of its obligations under said contract; so that said owner has always been and is ready, able and willing on its part to perform all of the terms of said contract and the supplements thereto.

3. That said builder, the New York Shipbuilding Company, had, up to the 3d day of August, 1917, duly contracted for all of the materials, equipment and supplies sufficient to complete said ship as specified in said contract, and that a large portion of such material, equipment and supplies had been duly prepared and delivered to the yard of said builder on said day, and that the remainder thereof, sufficient to complete said ship, had been duly contracted for by said builder and was, thereafter, delivered under the provisions of said contracts and entered into the construction and completion of said ship; and that said builder had performed and caused to be [fol. 5] performed a large amount of labor under said contract upon, in and about the construction of said ship, and that said builder had duly paid for said contracts for material, equipment and supplies, the delivery thereof, and for the labor furnished and performed in and about such construction by moneys so paid to said builder by said owner as herein stated; and that said builder, on the 3d day of August, 1917, on its part, had fully complied with the terms of said contract, and was then and was always thereafter ready, able and willing to complete the same in all particulars.

4. That on the 25th day of May, 1917, the said East Coast Transportation Company, for due and sufficient consideration, duly assigned and transferred the said contract for construction of said ship made with said New York Shipbuilding Company, the builder, dated the 28th day of March, 1917, together with all amendments and supplements thereto, and all rights therein, to the said Carpenter-O'Brien Company, now the claimant herein, under its change of name, the Brooks-Scanlon Corporation, as hereinbefore set forth.

5. That on June 15, 1917, by Chapter 29, 40th Statutes at Large, 183, Congress authorized the President, among other things to modify, suspend and cancel or requisition any existing or future contract for the building, production or purchase of ships or materials, etc., and further to purchase, requisition or take over the title to or the possession of, for use or operation by the United States, any ship then constructed or in the process of construction, or thereafter constructed, or any part thereof, or the charter of said ship. In

further accordance with said act the President, by order dated July 11, 1917, deputed to the United States Shipping Board Emergency Fleet Corporation full power to act thereunder including the power to provide just compensation therefor, and the said corporation, by [fol. 6] its order of August 3, 1917, on behalf of the United States, took over all the property of the claimant in or under said contract, including the said ship under construction and all materials, machinery, equipment, outfit and commitments therefor, and all labor performed thereon necessary for its completion, meaning thereby everything in existence and as expressed in said order "required to complete the construction of said requisitioned ships under construction," as will more fully appear by reference to the order of W. L. Capps, General Manager, which reads as follows:

"Enclosure 'A'

"August 28, 1917.

To Carpenter-O'Brien Company:

Re New York Shipbuilding Corporation

"By virtue of an Act of Congress, approved June 15, 1917, entitled 'An Act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive Order of the President, dated July 11, 1917, all power-driven cargo-carrying and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

"On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

"The compensation to be paid will be determined hereafter and will include, ships, material and contracts requisitioned.

"You will furnish immediately general plans and detail specifica- [fol. 7] tions of the ships requisitioned and copies of contracts and all supplemental agreements in relation thereto and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts."

"You will report immediately whether any additional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

"W. L. Capps, General Manager United States Shipping Board Emergency Fleet Corporation. Washington, D. C., August 3, 1917."

That said requisition order was fully complied with and all of the property of said owner, the claimant herein, hereinbefore described, was taken by the said United States Shipping Board Emergency Fleet Corporation for and on behalf of the United States, and was thereafter retained by and used for the purposes of the United States as provided by law. And that the said owner was thereby and thereafter deprived of all of its use and value. That said ship so taken was then under construction by said builder and thereafter was fully completed without change of plans or specifications from those set forth in the said construction contract as amended and supplemented, and that the said materials, equipment, outfit and supplies, and the said commitments and contracts for materials, equipment, outfit and supplies as described in said requisition order and paid for by the said owner and taken as aforesaid, were actually used in the construction and completion of said ship and were substantially sufficient to so construct, complete, equip and supply said ship as described in said plans and specifications as amended and supple-
[fol. 8] mented; that said ship so constructed and completed was of the size of 8,597 dead weight tons as hereinbefore set forth, and that in addition to the said sum of four hundred nineteen thousand, five hundred dollars ($419,500) so paid by said owner, the claimant herein, to the said builder, under the terms of said contract as amended and supplemented in order to fully comply with the terms and conditions thereof, and secure the construction, completion, equipment and supplying of said ship, said construction contracts further required that the owner should pay to said builder the sum of four hundred twelve thousand, one hundred thirty dollars ($412,130) as hereinbefore set forth; and the said owner, the claimant herein, was then and has ever since been fully prepared, able and ready to comply with said requirement and every other requirement on its part, as set forth in said contract so amended and supplemented.

6. That a fair and reasonable value of the said property so requisitioned and taken, and of which said owner was deprived on said 3d day of August, 1917, as aforesaid, was, at the rate of two hundred fifty dollars ($250) per ton for 8,597 dead weight tons, the sum of two million, one hundred forty-nine thousand, two hundred fifty dollars ($2,149,250) less the sum of four hundred twelve thousand, one hundred thirty dollars ($412,130) as aforesaid, (required to be paid by said owner to said builder under the provisions of said construction contract as amended and supplemented, in order to fully complete, supply and equip said ship in accordance with the terms and conditions of said construction contracts hereinbefore set forth), so that the total amount due to said claimant on the said 3d day of August, 1917, on account of the transactions hereinbefore set forth was the sum of one million, seven hundred thirty-seven thousand, one hundred twenty dollars ($1,737,120).

7. That said claimant has repeatedly attempted to secure an ad-
[fol. 9] justment of its claim against the United States with the United States Shipping Board Emergency Fleet Corporation, but has

failed to obtain any reasonable or just compensation; that theretofore, to wit, on the 28th day of January, 1920, the trustees of the United States Shipping Board Emergency Fleet Corporation offered the claimant in full satisfaction and settlement of its claim, the sum of four hundred forty-two thousand, six hundred eighty-three dollars and eighty-two cents ($442,683.82) as will more fully appear by reference to the following copy of said offer:

"Whereas, The Requisition Claims Committee has heretofore been appointed by the trustees of this corporation to investigate and hear claims arising out of acts of requisition by the Emergency Fleet Corporation, pursuant to authority conferred by the Emergency Shipping Fund provisions of June 15, 1917 (40 Stat., 182, ch. 29), and the Executive Order of the President dated July 11, 1917 (No. 2664); and

"Whereas, Said Requisition Claims Committee, in report dated 29th day of November, 1919, has made certain findings of fact with respect to property requisitioned from the Brooks-Scanlon Corporation and has made an award of just compensation for the property so taken in the amount of $177,230.44 and has further recommended the refund to the Brooks-Scanlon Corporation of $265,453.38 on account of progress payments heretofore made by that corporation to the shipbuilder in excess of cost of material requisitioned, and

"Whereas, The trustees, after due consideration of the report of said committee, approve the same; now, therefore, be it

"Resolved, That the report of said committee be and the same is hereby adopted and by reference made a part thereof, and that a copy of said report be spread upon the minutes of this meeting; further

[fol. 10] "Resolved, That the payment of said compensation and the refund of progress payments as set forth above, be and the same is hereby authorized upon the submission of proper releases in form satisfactory to the legal division."

And that thereafter on the 24th day of February, 1920, the said United States Shipping Board Emergency Fleet Corporation did issue its vouchers of payment of said date, one for the sum of $132,922.83 described therein for the "property requisitioned from the Brooks-Scanlon Corporation as follows:

"The power-driven, cargo-carrying ship about 2,500 tons d. w. capacity, under construction in the yard of the New York Shipbuilding Corporation designated as Hull No. 193, and certain materials, machinery, equipment, outfit, and commitments for material, machinery, equipment, and outfit necessary for the completion for said ship at that time." Payment made in accordance with resolution of the board dated 1/29/20."

75% of $177,230.44 ..... $132,922.83"

And another voucher for the sum of $199,090.04 described therein as:

"Refund to Brooks-Scanlon Corporation at 75% of $265,453.38 on account progress payments heretofore made by said corporation to the New York Shipbuilding Company in excess of cost of material requisitioned; for hull designated as Hull 193 under construction in the yard of the New York Shipbuilding Company. Payment made in accordance with resolution of the board dated 1/29/20.

75% of $265,453.38 ..... $199,090.04."

And that claimant received said vouchers and the sums named therein, and credited such amounts so paid upon the claim so due it.

That thereafter, on or about the 19th of May, 1920, the claimant [fol. 11] filed with the United States Shipping Board Emergency Fleet Corporation, an application in writing, requesting that said resolution of said Board of Trustees of said Fleet Corporation under and of the date of January 28, 1920, be amended in two particulars, to wit: First, that said resolution of award cover and include all items of property described in said requisition order of August 3, 1917, and in said voucher of said payment of said compensation of February 24, 1920, and the said property as herein described seized and taken from claimant by the United States under its authority as hereinbefore set forth.

Second. That the remaining part of said progress payment so remaining unpaid to claimant, namely, 25 per cent of the said sum of $265,463.38, or the sum of $66,373.34, withheld from claimant as aforesaid, be paid to claimant. That after consideration of said application, at a meeting of the Board of Trustees of said Emergency Fleet Corporation, held on the first day of June, 1920, the said Board of Trustees refused and denied the said requests of said claimant, contained in said application.

8. That the claimant has declined and does decline to accept such sums as compensation and has informed such trustees that the amount awarded was not satisfactory and was not the just compensation to which claimant was entitled, and requested the payment of seventy-five per cent (75%) of the amount of said award, reserving its right under the provisions of section 3 of the Act of April 22, 1918, to bring suit under section 24, paragraph 20, and section 145, of the Judicial Code for the difference between the amounts awarded and the amount which will make a just compensation for the property taken.

No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner [fol. 12] thereof, or interested therein; no assignment or transfer of this claim or of any part thereof or interest therein has been made. The claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the said government. The claimant is a citizen of the United States, and the claim-

ant claims the amount of one million, four hundred four thousand, one hundred eighteen dollars ($1,404,118).

Frederick C. Stevens, Jackson H. Ralston, Attorneys for Claimant.

DISTRICT OF COLUMBIA, ss:

Jackson H. Ralston being first duly sworn, deposes and says that he is the duly appointed attorney of the claimant, Brooks-Scanlon Corporation, and as such is authorized to make this affidavit, and is acquainted with the matters hereinbefore set forth; that he has read the foregoing petition, and the matters therein stated are true to the best of his knowledge, information and belief.

Jackson H. Ralston.

Subscribed and sworn to before me this 11th day of June, A. D. 1920. Stanley D. Willis, Notary Public, D. C.

[fol. 13] IN THE COURT OF CLAIMS

III. GENERAL TRAVERSE

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rul 34.

IN THE COURT OF CLAIMS

IV. HISTORY OF PROCEEDINGS

On February 6, 1923, this case was argued and submitted on merits.

On March 5, 1923, the Court filed an order filing tentative findings and setting the same for argument.

IN THE COURT OF CLAIMS

V. ARGUMENT AND SUBMISSION OF CASE

On March 26, 1923, this case was argued and submitted on tentative findings by Mr. Jackson H. Ralston, for the plaintiff, and by Mr. W. L. Cole, for the defendant.

[fol. 14] IN THE COURT OF CLAIMS

VI. **Findings of Fact and Conclusion of Law, Opinion of the Court by Hay, J., and Dissenting Opinion by Campbell, C. J.**—Entered April 23, 1923.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff is a corporation duly organized and existing under the laws of the State of Delaware. On October 20, 1917, Scanlon and his associates acquired an interest in the Carpenter-O'Brien Co. and on December 8, 1917, the name of the Carpenter-O'Brien Co. was changed to the Brooks-Scanlon Corporation. The Carpenter-O'Brien Co. was the assignee of all the interests of the East Coast Transportation Co. in the contract hereinafter set forth between the East Coast Transportation Co. and the New York Shipbuilding Co., a corporation organized under the laws of the State of New Jersey, which latter company transferred all of its rights, property, and interest on December 16, 1916, to the New York Shipbuilding Corporation, a corporation organized and existing under the laws of the State of New York, included in which was the contract hereinafter set out.

II

On March 28, 1916, a contract in writing was entered into between the New York Shipbuilding Co. and the East Coast Transportation Co. whereby the said shipbuilding company agreed to construct in its yard at Camden, N. J., a certain steamship of about 8,100 tons d. w. t. according to the plans, specifications, and conditions described, being part of said contract, and as consideration to the builder the said East Coast Transportation Co. agreed to pay the sum of $595,000 in certain installments set forth in said contract, said ship when completed to be delivered to said East Coast Transportation Co., at the dock of the builder at Camden, N. J., on or before the 1st day of February, 1918. The contract also provided that alterations might be made in the construction of said ship by agreements in writing at a price agreed upon and settlements therefor to be made at the completion of the vessel. The contract also provided that every facility for inspection of workmanship and material and classification of the vessel should be provided for [fol. 15] the contractor by the builder with full authority to reject whatever should not conform to the provisions of the contract, the builder at its own expense at all times during the construction of said vessel to provide suitable insurance to an amount at least equal to payments made by contractor, and the builder to make good all defective workmanship and material which might develop within

three months after delivery of said vessel to the contractor. A copy of said contract is filed in the record of this case as plaintiff's Exhibit 4, and is made a part hereof by reference.

III

Between July 5, 1916, and May 25, 1917, changes in the construction of said ship were agreed to in the manner provided by the contract increasing the d. w. t. to 8,597 tons and the price for said ship to $811,130, and providing for some changes in payment of installments, and further providing that some of the changes should be submitted to the officials of the Bureau Veritas (the inspector). No changes were thereafter made in the plans and specifications before August 3, 1917.

IV

On May 24, 1917, the East Coast Transportation Co. by instrument in writing assigned and transferred all its right, title, and interest in and to the contract referred to to the Carpenter-O'Brien Co., owner of all the stock of the said East Coast Transportation Co., and the latter company was thereafter dissolved.

V

On July 11, 1917, the President, by virtue of authority vested in him by the act of Congress of June 15, 1917, by an Executive order delegated the powers conferred upon him by said act to the United States Shipping Board Emergency Fleet Corporation. Under the authority so conferred upon it the Shipping Board on August 3, 1917, served on the New York Shipbuilding Corporation notice and order of requisition, which is in part as follows:

"* * * All power-driven cargo-carrying and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

"On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction and will prosecute such work with all practical dispatch.

"The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

"You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to the owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts."

[fol. 16] Among the vessels included within the above requisition order was the ship under construction referred to in these findings, known as hull 193, and afterwards as the ship M. J. Scanlon, and

being the same vessel which the New York Shipbuilding Co. agreed to build for the East Coast Transportation Co.

VI

On August 18, 1917, the Emergency Fleet Corporation issued and served on the East Coast Transportation Co., and on August 28, 1917, issued and served to the Carpenter-O'Brien Co., the following letters:

V.d.s p.38

"United States Shipping Board
"Emergency Fleet Corporation,
"Washington, August 28, 1917.

"To Carpenter-O'Brien Company:

"Re New York Shipbuilding Corporation

"By virtue of an act of Congress approved June 15, 1917, entitled 'An act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive order of the President dated July 11, 1917, all power-driven cargo-carrying, and passenger ships above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

"On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

"The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

"You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

"You will report immediately whether any additional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

"(Signed) W. L. Capps, General Manager United States Shipping Board Emergency Fleet Corporation. Washington, D. C., August 3, 1917."

[fol. 17] This was accompanied by the following letter:

"United States Shipping Board,
"Emergency Fleet Corporation,
"Washington August 28, 1917.

"Carpenter-O'Brien Company,
"8 West 40th Street, New York City.

"DEAR SIRS:

"On August 3, 1917, the United States Emergency Fleet Corporation issued to the New York Shipbuilding Corporation the notice or requisition set forth in enclosure (a).

"In response to this communication the New York Shipbuilding Corporation, the shipbuilders, informed us that the East Coast Transportation Company, as owners, or representatives of owners, had entered into a contract with them for the following vessel:

"Hull No. 193; type, cargo; D. W. ton., 8,100; date of contract, 3-28-16 (assigned 5-24-17).

"Under date of August 23rd you advised that this contract had been assigned to you.

"The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. Will you please inform the district officer, Mr. G. R. McDermott, at room 302, 1319 F St. NW., Washington, D. C., the names of your representatives and their compensation, sending a duplicate to this office. Your co-operation with the corporation is invited.

"The corporation will consider payments to the contractor accruing since the date of requisition, upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

"You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original vouchers and receipts and should be verified under oath by the proper corporate officer of your company.

"It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if after investigation of data submitted by you such payments are found in order and in conformity with the contract requirements.

"At your further and early convenience you are requested to submit to the corporation a statement of such indirect expenditures as you have made on account of each vessel; for instance, the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

"It will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the

owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above. The corporation requests that there be included in your response to this letter all evidence [fol. 18] of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

"The consummation of the orders herein and heretofore transmitted will be made the subject of later appropriate corporate action.

"Very truly, yours, W. L. Capps, General Manager."

"United States Shipping Board,
"Emergency Fleet Corporation,
"Washington, August 18, 1917.

"To East Coast Transportation Co.

"Re New York Shipbuilding Corporation

"By virtue of an act of Congress approved June 15, 1917, entitled 'An act making appropriations for the Military and Naval Establishments on ccount of war expenses for the fiscal year ending June thirtieth, nineteen hundred nd seventeen, and for other purposes,' and by authority delegated to the United States Shipping Board Emergency Fleet Corporation, under Executive order of the President dated July 11, 1917, all power-driven, cargo-carrying, and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

"On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction, and will prosecute such work with all practicable dispatch.

"The compensation to be paid will be determined hereafter and will include ships, materials, and contracts requisitioned.

"You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

"You will report immediately whether any additional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

"(Signed) W. L. Capps, General Manager United States Shipping Board Emergency Fleet Corporation. Washington, D. C., August 3, 1917."

VII

On August 16, 1917, the New York Shipbuilding Corporation forwarded to the Emergency Fleet Corporation a copy of the construction contract with plans and specifications, supplements and data pertaining thereto and the next day forwarded financial data, facts as to conditions of construction and percentage of completion. On [fol. 19] August 23, 1917, the Est Coast Transportation Co. notified the officers of the Emergency Fleet Corporation of the transfer of their interest in said ship to the Carpenter-O'Brien Co., the name of the designer of the vessel and of its local inspector, who was thereupon taken over by the Emergency Fleet Corporation to act for it in the same manner in the construction of such ship as he had acted for the Carpenter-O'Brien Corporation, dating such employment from August 3, 1917. On August 27, 1917, the Carpenter-O'Brien Corporation forwarded to the Emergency Fleet Corporation a list of payments to the shipbuilding company as paid under requirements of the construction contracts, which statement was identical with that theretofore presented by the shipbuilding company to the Fleet Corporation on August 16, 1917, and as set forth in the contract between the Emergency Fleet Corporation and the New York Shipbuilding Corporation, dated December 8, 1917.

VIII

On August 22, 1917, the following letter with inclosure was received by the New York Shipbuilding Co.:

"United States Shipping Board,
"Emergency Fleet Corporation,
"District Office No. 3,
"Washington, August 22, 1917.

"New York Shipbuilding Corporation,
Camden, N. J.

"GENTLEMEN:

"Enclosed please find copy of letter addressed to me by Admiral W. L. Capps, general manager of the Emergency Fleet Corporation. Will you kindly read this carefully and govern yourself accordingly?

"Promptness in reply will be much appreciated.

"Yours faithfully, (Signed) Geo. R. McDermott, District Officer."

"United States Shipping Board,
"Emergency Fleet Corporation,
"Washington, August 22, 1917.

"Mr. G. R. McDermott,
"Room 302 1319 F Street N. W.,
Washington, D. C.

"DEAR SIR:

Referring to the vessels under construction in the yard of New York Shipbuilding Corporation, Camden, N. J., requisitioned under

the corporation's order of August 3rd, precedent to the final examination of the contract for the vessels in question, you are requested to inform the shipbuilder as follows:

"The ships now under construction at your plant and referred to above having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States, and an order having been placed with you by due authority to complete the construction of said ships with all practicable dispatch, you are further ordered by the President of the United States, represented [fol. 20] by this corporation, to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification, and survey thereof, including the meeting of the requirements of the said contract and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

"All work will proceed under the inspection of such persons as have been or may hereafter, from time to time, be designated by this corporation for that purpose.

"For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid: Provided, That on acceptance in writing of this order you agree that on final acceptance of the vessel to give a bill of sale to the United States in satisfactory form, conveying all your right, title, and interest in the vessel, together with your certificate that the vessel is free from liens, claims or equities, with the exception of those of the owner, and then only to those set forth in the contract. Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order.

"This order applies only to vessels actually under construction and in accepting it the corporation expects you to inform it of the actual stage of construction of each vessel or the part to be assembled therein on the date of requisitioning, August 3, 1917. The corporation reserves the right to decide whether or not a vessel was actually under construction on August 3, 1917, on consideration of the ascertained facts.

"In replying to this communication, please arrange to specify separately the vessels to which this order refers, and refer to the corresponding contract in sufficient terms for identification of it.

"Please furnish a copy of this to New York Shipbuilding Corp., and ask for an early reply.

"Very truly, yours, (Signed) W. L. Capps, General Manager."

IX

On September 20, 1917, the New York Shipbuilding Corporation wrote the following letter to the Emergency Fleet Corporation:

September 20, 1917.

"United States Shipping Board
"Emergency Fleet Corporation,
"Admiral W. L. Capps, General Manager,
"Washington, D. C.

"DEAR SIR:

"Referring to the order dated August 22, 1917, made by United States Shipping Board Emergency Fleet Corporation, and delivered to this company, we beg to say:

"We understand that by the act of Congress of June 15, 1917, entitled 'An act making appropriations for the Military and Naval [fol. 21] Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes,' and the Executive order dated July 11, 1917, made by the President with respect to said act, and transmitted to us by the Emergency Fleet Corporation under date of August 3, 1917, we are under obligation to comply with the order of the Emergency Fleet Corporation dated August 3, 1917, requisitioning ships at this company's plant.

"This corporation, therefore, accepts United States Shipping Board Emergency Fleet Corporation's order dated August 22, 1917, for the completion of the vessels under contract in this yard on August 3rd, 1917, known as hull No. —, and agrees that, upon the completion and acceptance of said vessels and upon complete payment United States Shipping Board Emergency Fleet Corporation, together with such additional compensation as may be agreed upon, this company will execute and deliver to the United States of America a bill of sale conveying all this company's right, title, and interest in the vessels without prejudice to any claim of the person or corporation who originally contracted for the construction of said vessels, and those claiming rights under such original contractor, together with our certificate that the vessels are free from liens, claims, or equities except such liens, claims, or equities as may be asserted by, or exist in favor of, the person or corporation who originally contracted for the construction of the vessels, and those claiming rights under such original contractor.

"Yours, very truly, —— ——, Vice President."

X

On September 13, 1917, the following telegram was received by the New York Shipbuilding Corporation: "Do not accept further payment from former owners on account of requisitioned ships. This is mandatory. George R. McDermott, District Officer." Like verbal notice was given by Admiral Bowles to Scanlon. After this date the plaintiff made no further payments to the New York Shipbuilding Co. on account of hull 193 under the provisions of the contract.

XI

The plaintiff was never in default in the performance of its part of the requirements of the construction contract. The shipbuilding

company on its part was ready and willing to perform on its part all the requirements of said contract to its completion. At that time the plaintiff had on deposit in various solvent banks the sum of $238,730 deposited and held solely to meet payments by it to the builder as required in said contract, which sum of money was sufficient to pay all of the instalments set forth in said contract.

XII

Immediately after the execution of the construction contract the New York Shipbuilding Co., in its own name and on its own credit, ordered all of the material and equipment for the construction and outfitting of said vessel for which sufficient data then existed, and [fol. 22] before August 3, 1917, by various commitments completed its orders for substantially all of the material, equipment, and outfit needed as provided by the contract, supplements thereto, and plans and specifications, all of which were duly delivered to it and used in the construction and completion of said ship. The title to these materials was in the New York Shipbuilding Corporation, on August 3, 1917, the date of the requisition order, and the plaintiff never had nor claimed any title in and to these materials either before or after the date of the requisition order. The orders and commitments were sufficient to complete said ship, and all materials, machinery, and outfit covered thereby were duly delivered and used in the construction and completion of such ship at the prices fixed in such orders and commitments, and no further material was purchased subsequent to August 3, 1917, except for the sum of $31,000 for material used for the construction ordered for the military protection of the vessel. Representatives of the Fleet Corporation were present and informed of these facts.

XIII

Up to and including August 3, 1917, between 35 and 40 per cent of the necessary material, machinery, outfit and equipment, valued at about the sum of $118,000, and labor at about the amount of $24,000 had been delivered to the builder ready for use and used in the construction of the said ship, and on that day the said ship was about 19 per cent completed. Said ship was thereafter substantially completed by the use of all such material, equipment, and supplies, and was launched on July 6, 1918, and delivered to the United States on September 20, 1918.

XIV

The East Coast Transportation Co. made a contract with the Bureau Varitas for its inspection and classification service, which contract was continued by its successors, and said service was furnished from the commencement of the construction of said ship to its completion. The Emergency Fleet Corporation notified the Carpenter-O'Brien Co. that the inspection would be continued by the Bureau Veritas. What amount was paid by the East Coast Transportation Co., the Carpenter-O'Brien Co., and the plaintiff to the Bureau Veritas before August 3, 1917, does not appear in the record.

XV

The plans and specifications described in and made a part of the contract and the supplements thereto were ordered and paid for by the plaintiff and its assignors and were used after August 3, 1917, for the benefit of the Emergency Fleet Corporation in the construction of and completion of said ship. The value of the plans and specifications was about 2½ per cent of the contract price or $20,277.25.

XVI

On December 8, 1917, the Emergency Fleet Corporation made a contract with the New York Shipbuilding Corporation and the [fol. 23] American International Corporation relative to the completion and disposal of hull 193, which contract, or the part of it pertinent to this suit, is as follows:

* * * * * * *

Statement of premises.—On and prior to August 3, 1917, the Shipbuilding Corporation was constructing under private contract with the corporations named below (hereinafter called "former owners") ships bearing the hull numbers of the type and for the contract prices set opposite their respective names:

Hull No.	Type	Corporation	Contract price (max.)
174	Tanker.....	Standard Transportation Co.....	$875,000
175	Tanker.....	Standard Transportation Co.....	875,000
176	Collier.....	Darrow Mann Co.....	698,900
182	Coastwise.....	Transportation Co.....	507,500
183	Collier.....	Pocahontas Fuel Co.....	369,000
184	Collier.....	Darrow Mann Co.....	515,000
189	Tanker.....	Gulf Refining Co.....	640,000
190	Tanker.....	Petroleum Transportation Co....	1,010,000
193	Freighter.....	Carpenter-O'Brien Co.....	831,630
196	Tanker.....	Gulf Refining Co.....	1,045,000

Due to war conditions, such contract prices have proved and will prove to be less than the actual cost of constructing such ships. On August 3, 1917, all of such ships, together with the materials assembled therefor, were requisitioned by the Fleet Corporation, acting in accordance with the provisions of the urgent deficiency act of June 15, 1917, and the Executive order of July 11, 1917. The Shipbuilding Corporation by such requisition was directed to complete such ships on behalf of the United States.

The parties hereto desire to fix the just compensation to be paid to the Shipbuilding Corporation in accordance with the provisions of such urgent deficiency act, and to that end the Fleet Corporation is willing to increase such contract prices, provided the former owners of said ships, respectively, or if any former owner declines, the International Coropration, shall agree to accept retransfer to them, respectively, or to the International Corporation, as the case

may be, of said ships upon completion, and, upon such retransfer, repay to the Fleet Corporation its investment as hereinafter set forth, with respect to said ships, including extra costs of all sorts, and shall accept the charter rate prescribed by the United States Shipping Board and other conditions, all in accordance with the provisions of this agreement and agreements to be executed, forms of which are hereto annexed and marked "Exhibits A, B, and C."

* * * * * * *

Agreement.—Now, therefore, for and in consideration of the premises and of the mutual agreements hereinafter contained, it is hereby agreed as follows:

I

The Shipbuilding Corporation agrees to complete said hulls Nos. 174, 175, 176, 182, 183, 184, 189, 190, 193, and 196 in accordance [fol. 24] with the specifications annexed to the respective contracts under which such hulls were being constructed for the former owners prior to August 3, 1917, but will comply with all orders as to alterations in the construction or equipment thereof given by the Fleet Corporation or its duly authorized officers.

The Shipbuilding Corporation agrees to proceed with such completion of such ships with all due expedition, and to that end agrees that the Shipbuilding Corporation will not, during the construction of said ships, take any additional contracts for other ships from parties other than the United States Navy, which will interfere with such expedition.

II

The Fleet Corporation hereby agrees to pay to the Shipbuilding Corporation as just compensation for the completion of said ten ships, hulls Nos. 174, 175, 176, 182, 183, 184, 189, 190, 193, and 196 the entire cost of construction of said ships, figured from the commencement by the Shipbuilding Corporation of the construction of said ten ships up to the times of completion thereof respectively, and in addition thereto with respect to each ship ten dollars ($10) per dead-weight ton for profit. There shall be credited, however, in favor of the Fleet Corporation all sums heretofore received by the Shipbuilding Corporation on account of the construction of such ten ships respectively, either from the former owners or from the Fleet Corporation. A statement of the amounts so received by the Shipbuilding Corporation as to each such ship is hereunto annexed and marked Exhibit D. As construction progresses the Shipbuilding Corporation shall deliver monthly to the Fleet Corporation cost statements as to each such ship, covering the construction costs with respect thereto, so far as ascertained, and the Fleet Corporation shall pay to the Shipbuilding Corporation on or before the 15th day of each month the costs incurred during the preceding calendar month. The Fleet Corporation shall pay said profit of ten dollars ($10) per dead-weight ton; three dollars ($3) per estimated dead-weight ton at the time of laying the keel of each said ship; four dollars ($4) per

estimated dead-weight ton at the time of launching of each ship; and three dollars ($3) per estimated dead-weight ton at the time of delivery of the ship by the Shipbuilding Corporation.

III

A determination of the costs of said ships to date with payments of said profit in accordance with the stage of completion of each ship, as aforesaid, shall be made as soon as possible after date hereof, after proper audit by the Fleet Corporation. The costs of each ship shall be stated separately. The Fleet Corporation shall have free access to the books and records and contracts of the Shipbuilding Corporation for the purpose of determining such costs. Final determination of the amount of the Shipbuilding Corporation's said profit shall be made after the determination of the actual dead-weight tonnage of each ship, and any necessary adjustments shall then be made. Costs shall be determined as actual costs are defined in the form of agreement constituting Exhibit C hereto attached, relating to the construction of the three transports.

* * * * * * *

[fol. 25]

X

The Fleet Corporation, in accordance with the provisions of the said urgent deficiency act of June 15, 1917, hereby agrees to indemnify and save harmless the Shipbuilding Corporation from any and all loss or liability occasioned by reason of said requisition order of August 3, 1917, or any subsequent acts or orders given by the Fleet Corporation arising out of claims of the former owner or owners or anyone claiming under them.

* * * * * * *

Statement of amount received by New York Shipbuilding Co., either from "former owners" or from United States Shipping Board Emergency Fleet Corporation, on account of construction of ships, as per hull numbers, as follows:

Hull No.	By former owners	By E. F. Corp.	Total paid to date
174} 175}	$612,500.00	$525,000.00	$962,500.00
176	663,900.00	.....	663,900.00
182	237,500.00	.....	237,500.00
183	181,000.00	82,500.00	263,500.00
184	496,500.00	.....	496,500.00
189	328,889.48	122,697.95	451,587.43
190	190,000.00	105,000.00	295,000.00
193	419,500.00	.....	419,500.00
196	172,452.69	72,063.52	244,516.21
	3,302,242.17	907,261.47	4,034,503.64

XVII

In accordance with the provisions of the statute the plaintiff filed its claim for the payment of just compensation with the Emergency Fleet Corporation for the property which it alleged the said corporation had requisitioned from it on August 3, 1917. On January 23, 1920, the Emergency Fleet Corporation adopted a resolution awarding to the plaintiff as just compensation the sum of $442,683.82. The plaintiff being dissatisfied with this award refused to accept the same and so notified the Emergency Fleet Corporation, and on February 24, 1920, the defendant paid to the plaintiff the sum of $332,012.87, that sum being 75 per cent of said award.

The award made by the Emergency Fleet Corporation to the plaintiff as just compensation for property requisitioned on August 3, 1917, was made up of two items, to wit, $177,230.44, which was computed to be the value of the materials, equipment, and machinery which were in the yard of the New York Shipbuilding Co. at the time of the requisition, and which materials, etc., were in fact the property of the New York Shipbuilding Corporation. The second item was the sum of $265,453.38, which sum was on account of progress payments made by the plaintiff and its assignors to the New York Shipbuilding Co. in excess of cost of material requisitioned. [fol. 26] The plaintiff and its assignors paid to the New York Shipbuilding Corporation in cash $239,509, in notes for which it has paid $180,000, and payments which it has made of interest on notes $28,433.33—in all, $447,933.33. The plaintiff also paid the sum of $5,500 to architects. The plaintiff also furnished plans and specifications of the value of $20,277.25, making in all the sum of $473,710.58. It has been paid by the defendants the sum of $332,012.87.

XVIII

At the time the ship under construction was requisitioned by the United States the value of such ships was $200 per dead weight ton. The value of such ships on February 1, 1918, the date on which the said ship was to have been completed, was $200 per dead weight ton. If the ship had been completed on August 3, 1917, its value would have been $1,719,400 on that day. The contract price for building said ship was $831,600. The contract was 19 per cent completed on that day, and thereafter the defendant paid for the construction of said ship the sum of $412,130. The plaintiff had paid the sum of $453,433.33, making the sum of $865,563.33, the amount which was paid for the construction of the ship. That amount deducted from the value of the completed ship would leave the sum of $853,836.67.

Conclusion of Law

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is entitled to recover of and from the United States the sum of $473,710.58, less the sum of $332,012.87 which it has already received, and in addition thereto, as a

part of the just compensation to which it is entitled, the interest on $445,277.25 from August 3, 1917, to February 24, 1920, which amounts to the sum of $68,350.06, and the interest on $113,264.38, from February 24, 1920, to April 23, 1923, which amounts to the sum of $21,501.35.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of two hundred and thirty-one thousand five hundred and forty-nine dollars and twelve cents ($231,549.12).

Opinion

Hay, Judge, delivered the opinion of the court:

This is a suit brought by the Brooks-Scanlon Corporation against the United States to recover the sum of $1,275,923.07, and claim is also made for interest on that amount at 6 per cent per annum from February 24, 1920, to date of judgment.

On March 28, 1916, a contract in writing was entered into between the New York Shipbuilding Corporation and the East Coast Transportation Co., whereby the shipbuilding company agreed to build in its yard at Camden, N. J., a certain steamship of about 8,100 tons d. w. t. according to plans, specifications, and conditions described, and the East Coast Transportation Co. agreed to pay the sum of $595,000 to the shipbuilding company in certain installments set forth in the contract. The ship was to be delivered to the East Coast Transportation Co. on or before February 1, 1918. Between July 5, 1916, and May 25, 1917, changes in the construction of the [fol. 27] ship were agreed to increasing the d. w. t. to 8,597 tons and the price for said ship to $811,130.

On May 24, 1917, the East Coast Transportation Co., by instrument in writing, assigned and transferred all its right, title, and interest in and to the contract above referred to to the Carpenter-O'Brien Corporation, owner of all the stock of the East Coast Transportation Co., and the latter company was thereafter dissolved.

On October 20, 1917, Scanlon and his associates acquired an interest in the Carpenter-O'Brien Corporation, and on December 8, 1917, the name of the Carpenter-O'Brien Corporation was changed to the Brooks-Scanlon Corporation.

On December 16, 1916, the New York Shipbuilding Company transferred all of its rights, property, and interest to the New York Shipbuilding Corporation, organized and existing under the laws of the State of New York, included in which transfer was the contract for the building of the ship for the East Coast Transportation Co., referred to above.

On July 11, 1917, the President, by virtue of authority vested in him by the act of Congress of June 15, 1917, delegated his powers to the United States Shipping Board Emergency Fleet Corporation, and under the authority so conferred the Shipping Board on August 3, 1917, served on the New York Shipbuilding Corporation an order requisitioning "all power-driven cargo-carrying and passenger ships above 2,500 tons d. w. capacity under construction in your yard,

and certain materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States." And by said order the shipbuilding company was required to complete the construction with all practical dispatch. Among the vessels under construction in the yard of the New York Shipbuilding Corporation and included in the requisition order was the ship known as hull 193, and was the same ship which the shipbuilding corporation had agreed to construct for the East Coast Transportation Co. The Shipping Board sent to the East Coast Transportation Co. a letter in which was incorporated a copy of the requisition order which it had sent to the New York Shipbuilding Corporation.

On August 28, 1917, the Shipping Board sent to the Carpenter-O'Brien Corporation its order of requisition to the New York Shipbuilding Corporation, and on the same day wrote a letter to the Carpenter-O'Brien Corporation. That letter set out that the Shipping Board had been advised by the New York Shipbuilding Corporation that the contract for the building of hull 193 had been entered into with it by the East Coast Transportation Co., and that the Carpenter-O'Brien Corporation on August 23, 1917, had advised the Shipping Board that the contract for the construction of the vessel had been assigned to the Carpenter-O'Brien Corporation. The letter of the board contained the following paragraphs, among others:

"The corporation will consider payments to the contractor occurring since the date of requisition, upon the receipt of proper vouchers and adequate information to be forwarded through its district officers. You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original [fol. 28] voucher and receipts and should be verified under oath by the proper corporate officer of your company.

"It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder.

"At your further and early convenience you are requested to submit to the corporation a statement of such indirect expenditures as you have made on account of each vessel.

"It will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above. The corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law."

The Carpenter-O'Brien Corporation forwarded to the Shipping Board a list of payments which had been made by it to the shipbuilding corporation.

The title to the uncompleted ship (hull 193) and the materials which had been delivered or ordered for its completion was in the

New York Shipbuilding Corporation on August 3, 1917, the date of the requisition order. On that date the said ship was about 19 per cent completed; and was delivered completed to the United States on September 20, 1918.

On December 8, 1917, the Emergency Fleet Corporation made a contract in writing with the New York Shipbuilding Corporation for the completion and disposal of hull 193, and other hulls set forth in the said contract; hull 193 is the ship in controversy here. The provisions of this contract are set forth in the findings of fact in so far as they are pertinent to the issues in this case.

The plaintiff claims that the United States requisitioned and took its contract with the New York Shipbuilding Corporation, and that it is entitled to recover from the United States the value of that contract at the time of the taking. It claims that the value of the ship measures the value of the contract; and it is shown by the evidence that at the time of the alleged taking of the contract the value of such ships was $200 per dead weight ton. The ship when completed was 8,597 tons. The value of the ship was therefore $1,719,400. In other words, the plaintiff claims that its contract was worth the value of the ship when completed.

The questions to be determined are: Was there a requisitioning or taking of the contract by the United States; and if there was, what was the value of such contract at the time of the taking? In this case the President, through the Emergency Fleet Corporation, which acted by virtue of the authority vested in it by him, requisitioned certain ships under construction in the yard of the New York Shipbuilding Corporation. The power to make such requisition was given to the President by the act of Congress of June 15, 1917, while this country was engaged in war with Germany. That part of the act with which we are concerned in this case is as follows:

"(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

[fol. 29] "(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person." (40 Stat. 182.)

Under the provisions of this statute the Emergency Fleet Corporation requisitioned all ships under construction in the plant of the New York Shipbuilding Corporation on August 3, 1917. The language of the requisition order was as follows:

"By virtue of an act of Congress approved June 15, 1917, * * * and by authority delegated to the United State Shipping Board Emergency Fleet Corporation under Executive order of the Presi-

dent dated July 11, 1917, all power-driven cargo-carrying and passenger ships above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States."

The intent and purpose of the Shipping Board was, therefore, to requisition ships under construction, which was done in unmistakable language. It is admitted that the ships under construction, the materials, and so forth in the yard of the New York Shipbuilding Corporation were the property of that corporation, and the title to that property was in the shipbuilding corporation alone. Among the ships under construction so requisitioned was hull 193, which the shipbuilding corporation was building for the Carpenter-O'Brien Corporation, but it is not contended by the plaintiff that it had any title to or interest in said ship or the materials for its completion. All the interest it had was the right to the delivery of the ship when it should be completed. It follows that the United States did not take or requisition the ship or materials from the Carpenter-O'Brien Corporation, nor did the United States take over or requisition the contract which the Carpenter-O'Brien Corporation had with the shipbuilding corporation.

It was made plain to the Carpenter-O'Brien Corporation that the United States did not intend to requisition the contract, for on August 28, 1917, after notifying the Carpenter-O'Brien Corporation that it had taken over and requisitioned this ship from the shipbuilding corporation, the Shipping Board by letter of that date stated what its intention was. A copy of said letter is set forth in full in Finding VI. As further evidence showing the intention of the Shipping Board, reference is made to the letter of the board to G. R. McDermott, its officer, and which was communicated to the shipbuilding corporation. A copy of this letter is set forth in Finding VIII. And as final evidence that the United States did not requisition the contract, and never intended to, the United States entered into a contract with the shipbuilding corporation for the completion of all ships under construction in its yard, included in which ships was hull 193, thereby making its own contract for the completion of this ship. This contract is set out in Finding XVI. [fol. 30] It is true that the plaintiff by reason of the requisitioning of the ship by the United States was deprived of the right to have delivered to it the ship when completed.

But there has been in this case no direct taking of the contract. The injury inflicted upon the plaintiff is a consequential injury resulting from the exercise of a lawful power in the requisitioning of the ship under construction. The requisitioning has worked indirectly harm and loss to the plaintiff, but not such harm and loss as can be held to obligate the Government to pay for it. The action of the Government may have destroyed the worth of the contract, but the law affords no remedy. The Government by requisitioning the subject matter of the contract does not thereby take the contract.

The subject matter in this case was the ship under construction, and that was what the Government requisitioned, not the contract which was the agreement and obligation to perform. The performance of the contract in this case was frustrated and not appropriated. "Frustration and appropriation are entirely different things." Omnia Commercial Company v. United States, decided April 9, 1923, by Supreme Court of the United States.

Moreover, the building of the ship for the plaintiff was made impossible, and the performance of the contract to build was stopped by the requisition. Its performance was made impossible by an act of the Government. The basis of the mutual agreement between the parties was that the ship would be completed; and it must be held that the contract was entered into on an implied condition that if before the contract was completed its completion was rendered impossible by an act of Government the contract, as between the parties to it, would be at an end, and the parties to it would be absolved from liability under it. Texas Company v. Hogarth Shipping Co., 256 U. S. 619, 631, cited in the Omnia case, supra.

The President, in taking the ship, exercised a power conferred upon him by Congress. If in exercising this power the plaintiff was deprived of any right it may have had under a contract had by it with the person from whom the ship under construction was taken, that does not impose upon the Government an obligation to pay the plaintiff for its right. The deprivation of the right of the plaintiff to have its ship built and delivered to it by the New York Shipbuilding Corporation was incidental to the taking of the ship from its builder, and was not a taking of something for public use. The war powers of the Government were exercised in time of war for the public good and the injury complained of is only incidental to their exercise, and no obligation rests upon the Government to pay for the injury done. In exercising the war powers conferred upon it by the Constitution Congress has legitimately exercised them in the act of June 15, 1917; and having legitimately exercised them the injury to the plaintiff is only incidental to their exercise, and it is not entitled to compensation. Morrisdale Coal Co. v. United States, 55 C. Cls. 310, affirmed by Supreme Court, 259 U. S. 188; Pine Hill Coal Co. v. U. S., 55 C. Cls. 433, affirmed by Supreme Court, 259 U. S. 191.

The plaintiff presented its claim to the United States Shipping Board Emergency Fleet Corporation for the payment of just compen- [fol. 31] sation under the provisions of the statute, and on January 23, 1920, the Emergency Fleet Corporation adopted a resolution awarding to the plaintiff as just compensation the sum of $442,683.82. The plaintiff being dissatisfied with this award refused to accept it and so notified the Emergency Fleet Corporation, and on February 24, 1920, the defendant paid to the plaintiff the sum of $332,012.87, that sum being 75 per cent of said award. It appears from the evidence in this case that the award of just compensation made by the Shipping Board to the plaintiff was made up of two items, to wit: The sum of $265,453.38, which sum was on account of progress payments made by the plaintiff and its assignors to the New York Shipbuilding Corporation; and the second item was the

sum of $177,230.44, which was computed to be the value of the materials, equipment, and machinery which were in the yard of the New York Shipbuilding Corporation at the time of the requisition. The materials, etc., were not the property of the plaintiff but belonged to the shipbuilding company, and should not therefore have been taken into account in arriving at the compensation due the plaintiff.

The evidence in the case, however, discloses that the plaintiff and its assignors had paid to the New York Shipbuilding Corporation the sum of $447,933.33 on the construction of the ship before August 3, 1917, the date of the requisition; and the United States received the benefit of this sum when it settled with the shipbuilding corporation upon the completion of the ship. The United States also got the benefit of the sum of $5,500 paid to architects by the plaintiff, and of the sum of $20,277.25 the value of the plans and specifications paid for by the plaintiff, making in all the sum of $473,710.58, which was paid out by the plaintiff for the construction of said ship. Of this amount the plaintiff has been paid the sum of $332,012.87, leaving the sum of $141,697.71 still unpaid.

When the Emergency Fleet Corporation requisitioned the ship under construction which the shipbuilding corporation had contracted to build for the Carpenter-O'Brien Co., it also took and appropriated under its order of requisition the payments which the Carpenter-O'Brien Co. had made to the shipbuilding corporation, and also took over the plans and specifications which had been paid for by the last-named company. This is evidenced by the letter of August 28, 1917, written by the fleet corporation to the Carpenter-O'Brien Co., and by the following clause in the contract which the United States made with the shipbuilding corporation for the completion of the ship: "There shall be credited, however, in favor of the Fleet Corporation all sums heretofore received by the shipbuilding corporation on account of the construction of such 10 ships respectively, either from the former owners or from the Fleet Corporation." The record discloses that the sums paid by the Carpenter-O'Brien Co. were credited in favor of the Fleet Corporation, and were therefore taken and appropriated by the Fleet Corporation for the benefit of the United States, which was done by vitue of the provisions of the act of June 15, 1917. And the plaintiff is entitled to recover the amounts of money requisitioned and appropriated by the United States. The plaintiff claims that it is entitled to interest on the money requisitioned as a part of the just compensation to which it is entitled. The act providing for just compensation makes no provi-
{fol. 32} sion in respect of interest. 40 Stat. 183. The plaintiff's right in this case does not depend on contract, express or implied. This suit is a part of the authorized procedure initiated by the United States under the provisions of the statute cited above. The plaintiff was not satisfied with the amount fixed by the President and brought this suit. The question here is whether the payment at a subsequent date of the amount of money requisitioned is sufficient to constitute just compensation, and shall interest on the amount of money requisitioned be considered as a part of the just compensation to which

the plaintiff is entitled? The answer to this question is found in the opinion of the Supreme Court of the United States in the case of Seaboard Air Line Ry. Co. et al. v. United States, decided March 5, 1923. Mr. Justice Butler, speaking for the court, says: "The requirement that 'just compensation' shall be paid is comprehensive and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation." This court is of opinion that the allowance of interest is necessary in order that the plaintiff shall have the "just compensation" to which it is entitled. Seaboard Air Line Ry. Co. v. United States, supra.

The plaintiff is therefore entitled in addition to the sum of $141,697.71 to have interest on $445,277.25 from August 3, 1917, to February 24, 1920, which amounts to the sum of $68,350.06, and interest on $113,264.38 from February 24, 1920, to April 23, 1923, which amounts to the sum of $21,501.35. The judgment for the plaintiff will therefore be the sum of $231,549.12.

Graham, Judge; Downey, Judge; and Booth, Judge, concur.

CAMPBELL, Chief Justice, dissenting:

A contract is property for which compensation must be made when taken for public use. Omnia Commercial Co. v. United States, — U. S. —, decided April 9, 1923; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 690; Cincinnati v. L. & N. R. R. Co., 223 U. S. 390, 400. In the Omnia Commercial Company case the appellant owned a contract by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company. The Government requisitioned the steel company's entire production of steel plate for the year 1918 and directed that company not to comply with the terms of appellant's contract. Appellant brought suit in the Court of Claims, alleging that the Government's action was a taking of its property and that it was entitled to just compensation by virtue of the fifth amendment to the Constitution. The Supreme Court say: "The contract in question was property within the meaning of the fifth amendment * * * and if taken for public use the Government would be liable." See also upon the question of requisitioning contracts Russell Motor Car Co. v. United States, — U. S. —, decided April 9, 1923 (57 Ct. Cls. 464).

It is not questioned that there are implied conditions under which contracts are made that may excuse performance or even produce their dissolution. Texas Co. v. Hogarth Shipping Co., 256 U. S. 619, 630. Nor is it denied that the subject matter of a contract is not the contract itself, so that one may be taken and the other left. [fol. 33] The question therefore is, Was there a taking, an appropriation by the Government, of plaintiff's contract? The answer is to be found not alone in the communications of the Government's authorized agent in the premises but in the direct effect of its action as well. It is undisputed that plaintiff had a contract obligating the shipbuilder to construct and deliver a vessel according to specific plans and specifications upon definite terms; that the shipbuilder

could have delivered the ship; that plaintiff would have paid for it; and neither the plaintiff nor the shipbuilder was in default in any particular when the requisition order was issued. The vessel in its uncompleted condition belonged to the builder. All the plaintiff had was a contract, under the terms of which it had made substantial payments to the builder. This was the status when, under date of August 3, 1917, the agency duly authorized to act for the Government served notice on the builder that the United States "requisitioned" all ships above 2,500 tons dead-weight capacity "under construction" in its yard, including material, machinery, equipment, and outfit necessary for their completion, and that the builder was required to complete the construction and to prosecute such work with all practical dispatch. The notice stated that "the compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned." The builder was accordingly called upon to furnish immediately general plans and detail specifications of ships requisitioned, and copies of contracts, with full particulars as to the owner, date of completion, payments made, amounts still due, and all other information necessary to a determination of the obligations in taking over "these ships and contracts." On August 22 Mr. McDermott, who was acting for the Fleet Corporation, was directed to inform the shipbuilder to proceed in the work of completion in conformity "with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract described the ship, the materials, * * * and survey thereof, including the meeting of the requirements of the said contract and all tests * * * on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise."

Here we find a recognition of the contract and a direction to proceed according to its provisions. The notice, however, went further. The builder was informed that "for the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid." The Fleet Corporation made it plain that the order applied only to vessels actually under construction. These were requisitioned, they were to be completed according to the provisions of the contracts under which they had proceeded to their stage of completion, and payment was to be made upon the basis of the balance due under the contracts. When the Government's requisition issued and required completion for its own benefit, agreeing to pay therefor the contract price, diminished, however, by the amount of the paymnets plaintiff had made, it is conceded that the uncompleted vessel was taken. But what became of the plaintiff's payments and of the obligation of the contract? In answering this question, it is im- [fol. 34] portant to note that a contract was made between the Fleet Corporation and the builder, which recited that on and prior to August 3 the builder was constructing under private contract with parties called "former owners" the ship in question at designated "contract prices," and that due to the war conditions "such contract

prices have proved and will prove to be less than the actual cost of constructing such ships," and, among other things, stipulated that the builder would complete the vessel in accordance with "the specifications annexed to the respective contracts under which such hulls were being constructed for the former owners prior to August 3," but would comply with all orders as to alterations given by the Fleet Corporation. In payment the builder was to receive the entire cost of the construction, and in addition thereto "ten dollars per dead-weight ton for profit," but it was added: "There shall be credited, however, in favor of the Fleet Corporation all sums heretofore received by the shipbuilding corporation on account of the construction of such ten ships respectively, either from the former owners or from the Fleet Corporation." In other words, the Fleet Corporation agreement was to have the vessel completed in accordance with plaintiff's contract, plan, and specifications; to pay therefor plaintiff's contract price (with a bonus added) and then, in settlement for the completed vessel, to take credit to itself for the amounts plaintiff had paid. And this plan was consummated. Another provision of this contract was that the Fleet Corporation agreed to indemnify and save harmless the builder from any and all loss or liability occasioned by reason of the "requisition order of August 3," or any subsequent acts or orders given by the Fleet Corporation "arising out of claims of the former owner."

If the plaintiff had voluntarily assigned its contract with the builder to the Government, and the latter had expressly assumed the unfulfilled obligations and later received the completed vessel, it would not more effectively have acquired plaintiff's contract, its rights, and obligations than actually resulted from what was done in this case. The Government requisitioned the incomplete vessel with the purpose of requiring the completion in accordance with the existing contract; it did require the carrying out of that contract (with slight modification); it took plaintiff's right to have the vessel; it received the vessel and appropriated plaintiff's partial payments thereon to its own use and benefit. The contract was performed; the vessel was delivered. I think the plaintiff's contract was taken and appropriated.

Under the findings of fact it may be said that the Government evidently concluded that the reasonable cost of constructing a like vessel would be $10 per ton more than the contract price because it agreed to pay that much more after the requisition, and upon that basis the judgment could be increased at least in the amount thus ascertained.

[fol. 35] IN THE COURT OF CLAIMS

VII. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Twenty-third day of April, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge and decree that the plaintiff,

as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum Two hundred and thirty-one thousand five hundred and forty-nine dollars and twelve cents ($231,549.12).

By the Court.

IN THE COURT OF CLAIMS

VIII. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On May 14, 1923, the defendant filed a motion for a new trial. Said motion was overruled by the Court on May 21, 1923.

IN THE COURT OF CLAIMS

IX. PLAINTIFF'S APPLICATION FOR APPEAL—Filed May 8, 1923

Now comes the claimant, the Brooks-Scanlon Corporation, by Jackson H. Ralston, its attorney of record, and respectfully prays for the allowance of an appeal in the above entitled cause to the Supreme Court of the United States from the judgment heretofore entered in this cause by this court on April 23, 1923.

Brooks-Scanlon Corporation, By Jackson H. Ralston, Attorney of Record.

IN THE COURT OF CLAIMS

X. ORDER ALLOWING APPEAL

It is ordered by the Court that the plaintiff's application for appeal be and the same is allowed. Entered June 4, 1923.

[fol. 36] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Hay, J., and of the dissenting opinion by Campbell, Ch. J.; of the judgment of the court; of the plaintiff's application for an appeal and of the order of the court allowing said appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Seventh day of June, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

[fol. 37] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the annexed is a true copy of the defendant's application for appeal and of the court's order thereon allowing same, filed in the above-entitled cause. Same to be filed with the record on appeal, filed by the plaintiff, in the Supreme Court of the United States, in said case.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twentieth day of June, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

[fol. 38] IN THE COURT OF CLAIMS OF THE UNITED STATES, DEC. TERM, ——

I. DEFENDANT'S APPLICATION FOR APPEAL

[Title omitted]

From the judgment rendered in the above-entitled cause on the 23rd day of April, 1923, in favor of the claimant, the defendants, by their Attorney General, on the 11th day of June, 1923, make application for, and give notice of, an appeal to the Supreme Court of the United States.

Robert H. Lovett.

Filed June 11, 1923.

II. ORDER OF COURT ALLOWING APPEAL

Order

It is ordered by the Court that the defendant's application for appeal be and the same is allowed.

Entered June 18, 1923.

Endorsed on cover: File Nos. 29,677, 29,695. Court of Claims. Term No. 367. Brooks-Scanlon Corporation, appellant, vs. The United States. (Filed June 11th, 1923.) Term No. 385. The United States, appellant, vs. Brooks-Scanlon Corporation. Filed June 23d, 1923. File Nos. 29,677, 29,695.

COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

PLAINTIFF'S EXHIBIT 4, REFERRED TO IN FINDING II, AND OMITTED FROM THE RECORD ON APPEAL IN THE ABOVE-ENTITLED CAUSE

Claimant's Exhibit 4

This agreement, made this 28th day of March, A. D. 1916, by and between the New York Shipbuilding Company, a corporation organized and existing under the laws of the State of New Jersey, of Camden, New Jersey, hereinafter referred to as the contractor, and the East Coast Transportation Company, a corporation organized and existing under the laws of the State of Delaware, and having a usual place of business in New York, N. Y., hereinafter called the owner:

Witnesseth that the contractor, for and in consideration of the sum of five hundred and ninety-five thousand ($595,000) dollars to be paid to it, does hereby covenant and agree to and with the owner to build in a workmanlike manner for the owner, its successors and assigns, a single-screw, steel cargo steamer, to be in all respects a duplicate of the steamship William O'Brien, built at the yard of the contractor, and delivered to the owner about April 17th, 1915, and the plans and specifications of the said steamer William O'Brien are hereby referred to and form part of this agreement.

The said vessel when completed as hereinabove provided shall be delivered to the owner, and shall be accepted by the owner at the dock of the contractor in Camden, New Jersey.

The owner hereby agrees upon the true and faithful performance of this agreement on the part of the contractor, that it will pay or cause to be paid to the contractor, its successors or assigns, or legal representatives, the sum of five hundred and ninety-five thousand ($595,000) dollars, in payments to be made as follows, to wit:

Fifty-nine thousand five hundred ($59,500) dollars in cash upon the signing of this contract;

Forty-five thousand dollars ($45,000) on March 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on April 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on May 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on June 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on July 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on August 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on September 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on October 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on November 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on December 1st, 1917, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty-five thousand dollars ($45,000) on January 1st, 1918, payable $20,000 in cash and $25,000 by note maturing February 1, 1918;

Forty thousand five hundred dollars ($40,500) on delivery of ship, payable $15,000 in cash and $25,000 by note maturing Feb. 1, 1918.

The above notes, during their existence, shall be a first lien on the vessel, and interest at the rate of five (5) per cent per annum thereon shall be paid in cash at maturity, at which time the principal shall be funded in serial coupon bonds in denominations of $1,000, secured by first mortgage on the vessel, bearing interest at the rate of five (5) per cent per annum, payable semiannually, and maturing as follows:

Fifteen thousand dollars ($15,000) in six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in one year from the date of said bonds;

Fifteen thousand dollars ($15,000) in one year and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in two years from the date of said bonds;

Fifteen thousand dollars ($15,000) in two years and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in three years from the date of said bonds;

Fifteen thousand dollars ($15,000) in three years and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in four years from the date of said bonds;

Fifteen thousand dollars ($15,000) in four years and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in five years from the date of said bonds;

Fifteen thousand dollars ($15,000) in five years and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in six years from the date of said bonds;

Fifteen thousand dollars ($15,000) in six years and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in seven years from the date of said bonds;

Fifteen thousand dollars ($15,000) in seven years and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in eight years from the date of said bonds;

Fifteen thousand dollars ($15,000) in eight years and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in nine years from the date of said bonds;

Fifteen thousand dollars ($15,000) in nine years and six months from the date of said bonds;

Fifteen thousand dollars ($15,000) in ten years from the date of said bonds.

It is further agreed that the owner will pay to the contractor at the time of issuing the above bonds the cash sum of twelve thousand, eight hundred and ten ($12,810) dollars to compensate the contractor for such loss as it may suffer by reason of accepting said bonds bearing interest at the rate of five (5) per cent per annum instead of bearing interest at the rate of six (6) per cent per annum.

It is further agreed that the owner, if it so desire, may anticipate any of the payments hereinbefore mentioned, and that the Union Trust Company of Pittsburgh, Pennsylvania, shall be selected and appointed to act as trustee under said mortgage hereinbefore mentioned, to have and to hold said mortgage on said vessel in trust for the benefit and security of said bonds; and that the said trustee shall execute and issue said bonds as above provided for.

Time of Delivery.—Said vessel shall be completed on or before February 1st, 1918, and should the said date of delivery be anticipated, all unpaid cash monthly instalments will be liquidated, and the note payments funded as provided, on the delivery of the vessel.

Changes.—It is further agreed between the parties hereto that, should it be necessary to make any alterations in the construction of said vessel, such alterations shall be agreed to in writing, and the drawings approved by both parties and at a value mutually agreed upon in writing, settlement for said alterations to be made on the completion of the vessel.

Inspection.—Every facility shall be afforded the owner, or his representative, to inspect the work as it progresses; and it shall be his duty, for the account of the owner, to promptly inspect and accept all material and workmanship that shall be in conformity with the specifications hereunto attached, and to reject all material and workmanship that does not conform to such specifications.

Insurance.—It is further understood and agreed that at all times, during the construction of said vessel, and until the same shall be delivered to the owner, the contractor shall, at his own cost and expense, keep the said vessel insured against all damages by fire, water, launching, or other accidents of any kind during the progress of construction and until completed and finally delivered to the owner, in an amount at least equal to the partial payments that shall have been made by the owner, the loss, if any, to be payable as the respective interests may appear.

Delays.—In case of any delay in the work of said vessel that shall be caused by strikes of workmen, fire, or inevitable accident, beyond the control of the contractor, such cause shall be deemed a sufficient excuse for such delay, and the time of delay so caused shall be added to the time for completion of said vessel.

Guarantee.—The contractor agrees to make good all defective workmanship or material that may develop within three months after the date of the delivery of the steamer to the owner, other than ordinary wear and tear: Provided, however, That in order to satisfy itself that such defects arise from defective material or workmanship, and not from mishandling, the contractor shall be allowed to have a representative on board the steamer, who shall be acceptable to the owner, and who shall have free access to all parts of the steamer and its machinery. The owner will provide said representative with free berth and meals during the entire time he remains on the steamer. The contractor will pay the wages of said representative.

It is further agreed that should the owner be satisfied, before the expiration of the three months, that the workmanship and material of the vessel is satisfactory, they may dispense with the representative of the contractor, and in this case the guarantee of the contractor will then cease.

Arbitration.—In case there should be any disagreement between the parties as to this agreement, recourse shall be had to arbitration. The party appealing shall serve written notice containing the name of the arbitrator upon the other party, who shall within ten (10) days appoint his arbitrator, and the hearing shall take place not later than ten (10) days thereafter; should these arbitrators fail to agree, they shall within ten (10) days from the date of such disagreement select a third arbitrator, and a decision of a majority of these arbitrators shall be final and binding upon both parties to this agreement. All fees of the arbitrators shall be borne by the party unsuccessful in the appeal, but the said arbitrators may apportion the expenses between the parties in any case when in their opinion the facts of the case warrant such apportionment.

This agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the respective parties hereto.

In witness whereof the said New York Shipbuilding Company and East Coast Transportation Company have caused their respective corporate seals to be hereto affixed, and these presents to be signed in duplicate by their respective presidents and attested by their respective secretaries this twenty-eighth day of March, A. D. nineteen hundred and sixteen.

New York Shipbuilding Company, Sam'l M. Knox, President. Attest: J. Wickersham, Secretary. [Seal.] East Coast Transportation Company, S. J. Carpenter, President. Attest: F. A. Rautenberg, Assistant Secretary.

A true copy:
Test this First day of October, A. D., 1923.
F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

[Endorsed:] 367/29677.

[Endorsed:] File No. 29,677. Supreme Court U. S., October Term, 1923. Term No. 367. Brooks-Scanlon Corporation, Appellant, vs. The United States. Plaintiff's Exhibit 4, referred to in Finding 2. Filed Oct. 2, 1923.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

BROOKS-SCANLON CORPORATION, appellant, v. THE UNITED STATES.	No. 367.
THE UNITED STATES, APPELLANT, v. BROOKS-SCANLON CORPORATION.	No. 385.

APPEALS FROM THE COURT OF CLAIMS.

It appearing that the Court of Claims in its 6th Finding of Fact has made a clerical error and omission, it is hereby stipulated and agreed between the parties that such error and omission be corrected as follows: The "following letter," referred to in the 3d and 4th line of the 6th Finding of Fact, page 11 of the transcript of record, are the letter under date of August 28, 1917, printed at pages 12 and 13 of the transcript of record, and a duplicate of this letter under date of August 18, 1917, addressed to the East Coast Transportation Company instead of to the Carpenter-O'Brien Company, was sent by the Emergency Fleet Corporation to the East Coast Transportation Company on August 18, 1917. At the foot of each of these letters was written the words "Enclosure (1)." At the top of the paper first

quoted at length under the 6th Finding of Fact on page 11 of the record headed "United States Shipping Board Emergency Fleet Corporation, Washington, D. C., August 28, 1917, to Carpenter-O'Brien Company, Re New York Shipbuilding Corporation," were the words "Enclosure A." This document was enclosed with the letter printed at page 12 of the transcript of record. The document quoted at page 13 of the transcript of record headed "United States Shipping Board Emergency Fleet Corporation, Washington, D. C., August 18, 1917, to the East Coast Transportation Company, Re New York Shipbuilding Corporation," was marked "Enclosure A" and was the enclosure referred to in the letter from the Emergency Fleet Corporation to the East Coast Transportation Company of the same date hereinabove specified. It is further stipulated and agreed that this stipulation shall be filed with the clerk and printed and made part of the transcript of record or that the record be physically corrected by the clerk in accordance herewith.

Dated this 27th day of December, 1923.

WM. A. LANCASTER,
DAVID F. SIMPSON,
Counsel for Appellant.
EDWARD P. SANBORN,
of Counsel for Appellant.
JAMES M. BECK,
Solicitor General.
By HENRY M. WARD,
Of Counsel.

○

DEC 1
WM. R. S

29677

SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 367.

BROOKS-SCANLON CORPORATION,
Appellant.

vs.

THE UNITED STATES,
Respondent,

BRIEF OF BROOKS-SCANLON CORPORATION, APPELLANT.

WILLIAM A. LANCASTER,
DAVID F. SIMPSON,
630 First National Soo Line Bldg.
Minneapolis, Minn.

EDWARD P. SANBORN,
520 Guardian Life Bldg.,
St. Paul, Minn.,
Appellant's Attorneys.

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SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 367.

BROOKS-SCANLON CORPORATION,
Plaintiff and Appellant,

vs.

THE UNITED STATES,
Defendant and Respondent.

This action is here on appeal by both parties from the judgment of the Court of Claims entered April 23rd, 1923, in favor of the plaintiff for $231,549.12.

It involves the determination of the measure and amount of just compensation to which the plaintiff is entitled for the requisition by the Government on August 3rd, 1917, of a steamship under construction, and the taking and appropriation by the United States of plaintiff's contract with the builder for the construction of this ship.

The plaintiff claimed that the value of its contract and of its rights and interests under it on the date of the requisition with interest was the measure of just compensation.

The Court of Claims adopted as the measure the portion of the contract price which plaintiff had paid to the builder, plus the amount it had paid to architects and for plans and specifications, that is the amount of money expended by the plaintiff for those purposes and interest thereon from the date of the requisition.

Upon that measure the judgment is based.

The theory upon which that Court reached its conclusion is that under the police power of the government this contract was merely made unenforcible as between the parties to it—frustrated not taken.

The plaintiff's contention was in that Court and is here that the plaintiff's contract and its rights and interests under it were taken and appropriated by the United States for public use under its right of eminent domain, not frustrated merely.

STATEMENT.

Brooks-Scanlon Corporation, the plaintiff sought to recover in the Court of Claims $1,307,270 as just compensation for the requisition and taking on August 3rd, 1917, by the President for the use of the United under the act of Congress of June 15, 1917, (40 Statutes at Large, page 182), of a contract then owned by the plaintiff for the construction for it by the New York Shipbuilding Corporation, as builder, at Camden, New Jersey, of a steamship of the capacity of 8,597 dead weight tons, and the taking of this ship then in process of construction under this contract.

This contract was in writing and made March 28th, 1916, between New York Shipbuilding Company, the builder, and East Coast Transportation Co. called therein the owner, and provided that the Shipbuilding Company, or its assigns, would build for the Transportation Company, or its assigns, according to plans and specifications which were made a part of the contract, a steam ship of about 8,100 d. w. t., and deliver the same at Camden, New Jersey, on or before February 1st, 1918, for $595,000.00, which the Transportation Company agreed to pay in specified installments as the work progressed. (Record page 9; 33-37.)

This contract also provided that alterations might be made in the construction by agreements in writing; that the builder would afford every facility for inspection by the owner of workmanship and material as the work progressed, and that the builder at its own cost would keep the ship

insured until completed and delivered in an amount at least equal to partial payments made and cause the loss if any to be made payable to the parties as their interests might appear. (p. 35.)

Prior to May 25th, 1917, changes in the construction of this ship were agreed upon in writing increasing its capacity to 8,597 d. w. t., and the contract price to $831,630. (p. 10.) (p. 18.)

On May 24th, 1917, the East Coast Transportation Co. assigned this contract to Carpenter-O'Brien Co., a corporation, the name of which was changed December 8th, 1917, to Brooks-Scanlon Corporation, the plaintiff. (p. 10.)

On December 16th, 1916, the New York Shipbuilding Co. transferred and assigned all its right, title and interest in this contract to New York Shipbuilding Corporation. (p. 9.)

By Act approved June 15, 1917, and entitled, "An act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30th, 1917, and for other purposes," congress authorized and empowered the President to requisition any existing or future contract for the building of ships, and to requisition any ship in process of construction, and to exercise this power through such agency or agencies as he might determine.

This Act expressly provides that whenever the United States shall cancel, modify, suspend or requisition *any contract* it shall make just compensation therefor. (40 Statutes at Large, p. 182.)

On July 11, 1917, the President by an Executive order, delegated the powers conferred on him by

that act to the United States Shipping Board Emergency Fleet Corporation. (p. 10.)

On August 3rd, 1917, the Emergency Fleet Corporation issued and served upon the builder, New York Shipbuilding Corporation, a notice and order of requisition directed to it, and containing this language:

> "All power-driven, cargo-carrying, and passenger ships, above 2,500 tons d. w. t. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.
>
> "On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction, and will prosecute such work with all practicable dispatch.
>
> "The compensation to be paid will be determined hereafter and will include ships, materials, and *contracts* requisitioned.
>
> "You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of *contracts* and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and *contracts.*" (p. 10-11.)

Among the ships included within this requisition order was the ship described in the plaintiff's contract known as Hull No. 193, and afterwards as the ship M. J. Scanlon, in process of construction under that contract, in the yards of the Shipbuilding Corporation. (p. 10.)

August 18, 1917, this notice and order was served on East Coast Transportation Company, and on August 28, 1917, upon Carpenter-O'Brien Co., the plaintiff, whose name is Brooks-Scanlon Corporation. (p. 11.)

On August 22, 1917, the Emergency Fleet Corporation served on the New York Shipbuilding Corporation a notice and order containing the following, viz;—

> "The ships now under construction at your plant and referred to above having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States, and an order having been placed with you by due authority to complete the construction of said ships with all practicable dispatch, you are further ordered by the President of the United States, represented by this corporation to proceed in the work of completion heretofore ordered, *in conformity with the requirements of the contract, plans, and specifications* under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said *contract* describes the ship, the materials, machinery, equipment, outfit, workmanship, *insurance*, classification, and survey thereof, including the meeting of the requirements of the said contract and all tests as to efficiency and

capacity of the ship on completion, and in so far as the *contract contains provisions for the benefit and protection of the persons with whom the contract was made,* but not otherwise.

"All work will proceed under the inspection of such persons as have been or may hereafter, from time to time, be designated by this corporation for that purpose.

"For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the *contract* and not yet paid." (p. 14-15.)

On September 20, 1917, the Shipbuilding Corporation answering this notice and order stated that it understood that under the act of June 15, 1917, and the Executive order of the President of July 11, 1917, it was under obligation to comply with the order of requisition of August 3rd, 1917, to complete the construction of this ship and that upon completion and acceptance of the same, and upon complete payment by the Emergency Fleet Corporation with such additional compensation as might be agreed upon, it would execute and deliver to the United States a bill of sale conveying all its right, title and interest in the vessel without prejudice to any claim of the person or corporation who originally contracted for the construction of the vessel and those claiming rights under the original contractor.

On September 13, 1917, the Emergency Fleet Corporation instructed the Shipbuilding Corporation to accept no further payments from the former

owners on account of requisitioned ships, and notified the plaintiff of this instruction. (p. 16.)

The East Coast Transportation Company immediately after the construction contract was made, made a contract with Bureau Veritas for its inspection and classification service, which was continued by the plaintiff, and this service was furnished from the commencement of the construction to its completion. (p. 17.)

Neither party was ever in default in the performance of its part of the construction contract. On the date of the requisition the builder had in its yard or under commitments the material, equipment and outfit required to build and complete the ship according to the contract, and it was thereafter all used for that purpose. No further material was purchased except to the extent of $31,000 for material for the military protection of the vessel.

The plaintiff had the money with which to pay to the builder all the unpaid installments of the contract price and this money was on deposit in solvent banks and held for that purpose. (p. 16-17.)

On August 3rd, 1917, this ship was about nineteen per cent completed, and its construction was thereafter completed in accordance with the plaintiff's contract and the plans and specifications which were a part of it without any change except that above mentioned for the military protection of the vessel. It was launched July 6, 1918, and delivered to the United States September 20, 1918. (p. 17.)

These plans and specifications were ordered and paid for by the plaintiff and its assignor, and they were used after August 3rd, 1917, by and for the benefit of the Emergency Fleet Corporation in the construction and completion of the ship. The value of the same was $20,277.25. (p. 18.)

On December 8, 1917, the Emergency Fleet Corporation agreed with the Shipbuilding Corporation, to pay it a bonus of $10.00 per dead weight ton in addition to the cost of construction of this ship from the date of commencement to the time of completion crediting however in favor of the Fleet Corporation all sums received on account of the construction either from the former owners or from the Fleet Corporation, and the Shipbuilding Corporation on its part agreed to complete this ship *in accordance with the specifications annexed to the contract,* and to take no additional contracts for other ships from parties other than the United States which would interfere with expedition.

The Fleet Corporation also agreed to *indemnify* and hold harmless the Shipbuilding Corporation from all loss or liability occasioned by the requisition order of August 3, 1917, or any subsequent act or order given by the Fleet Corporation arising out of claims of the former owner or owners, or any one claiming under them. (p. 18-20.)

In accordance with the provisions of said Act of June 15, 1917, the plaintiff filed its claim for the payment of just compensation for the property requisitioned and taken from it on August 3, 1917, with the Emergency Fleet Corporation.

On January 23, 1920, the Fleet Corporation awarded the plaintiff as just compensation the sum of $442,683.82. The plaintiff refused to accept this award and so notified the Emergency Fleet Corporation, and on February 24, 1920, the defendant paid to the plaintiff 75% of the award, which was $332,012.87. (p. 21.)

Before August 3rd, 1917, the plaintiff and its assignor had paid to the New York Shipbuilding Corporation of the contract price $239,500.00 in cash, and $180,000.00 in notes which it paid, and $28,433.33 interest on notes, in all $447,933.33. It also paid $5,500.00 to architects, and for plans and specifications $20,277.25, making in all the sum of $473,710.58. It has been paid by the defendant as above stated $332,012.87.

The plaintiff and its assignor paid to the builder prior to August 3rd, 1917, $419,500 of the contract price. The Emergency Fleet Corporation appropriated this amount and paid to the builder $412,130 which was the unpaid balance of the contract price.

The market value of this ship on August 3rd, 1917 was $200 per dead weight ton, or $1,719,400.

Its value February 1st, 1918, the date on which it was to have been and but for the requisition of it would have been completed and delivered to the plaintiff under the contract was the same amount.

The Court below found as a conclusion of law that the plaintiff was entitled to recover as just compensation for this requisition and taking, the portion of the contract price which the plaintiff and its assignor had paid to the builder prior to

August 3rd, 1917, the date of requisition, $5,500 paid to architects, and $20,277.25 for plans and specifications, or $473,710.58, in all, less the sum of $332,012.87 received by it from the defendant February 24, 1920, and in addition thereto as damages interest at six per cent per annum.

The plaintiff claimed that the measure of the just compensation to which it was entitled was the value of its contract on August 3rd, 1917, and not merely the amount it had paid the builder and expended on it prior to that date.

ASSIGNMENTS OF ERROR.

I.

The Court of Claims erred in its conclusions of law that just compensation to the plaintiff was the portion of the contract price for the ship which had been paid to the builder before August 3, 1917, the date of the requisition, and the amount paid to architects and for plans and specifications.

The Conclusions of law from the facts found should have been that the just compensation to which the plaintiff is entitled is the value to it on that day of its contract and interest thereon.

II.

The Court erred in its conclusion of law that the measure of plaintiff's damages for the requisition and taking by the United States of the plaintiff's contract and the ship described in it was merely the amount of money which had been paid and expended by the plaintiff on and under the contract prior to the date of the requisition, and in addition interest thereon.

III.

It erred in this; that its conclusions of law do not follow from and are not nor is the judgment justified by the findings of fact. For the conclusions of law should have been that the plaintiff is entitled to recover the sum of $1,307,270, the value

of its contract and its rights under the same on August 3rd, 1917, less $332,012.87 the amount paid by defendant February 24th, 1920, that is $975,257.13 and in addition interest at 6%.

ARGUMENT.

The plaintiff's contract was property, and was within the protection of the clause of the 5th Amendment to the Constitution, "Nor shall private property be taken for public use without just compensation."

The United States had the power to condemn, requisition and take for public use this contract subject to this limitation and upon the condition that just compensation be made and not otherwise.

By the Act of June 15, 1917, congress authorized the President to requisition ships under construction and contracts for their construction, and expressly provided that the United States should make just compensation therefor.

It also provided that the President might delegate the power vested in him by this act. He did delegate the same to the Emergency Fleet Corporation.

On August 3rd, 1917, the United States acting through the Emergency Fleet Corporation requisitioned, appropriated and took for public use the plaintiff's contract, and all its rights and interests thereunder as well as the ship itself therein de-

scribed, and the material provided for its construction.

The plaintiff is entitled to recover the value to it on August 3rd, 1917, of this contract and these rights and interests as just compensation therefor.

I.

Plaintiff's Contract Was Property.

That a contract is property and is within the protection of the 5th Amendment to the Constitution, and that the power of the United States under its right of eminent domain to condemn or take it for public use is subject to the condition that just compensation be made is too well settled by the following authorities, among others, to require argument.

Monongahela Navigation Co. vs. United States, 148 U. S. 312.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685.

New Orleans Gas Light Co. vs. Louisiana Light, H. P. & Mfg. Co. 115 U. S. 650; 673.

Cincinnati vs. Louisville & Nashville R. R. Co. 223 U. S. 400-401.

West Bridge Co. vs. Dix, 6 Howard 507.

C. B. & Q. Ry. Co. vs. Drainage Commissioners, 200 U. S. 561; 593.

In the last case cited above the Court said:

"If in the execution of any power, no matter what it is, the Government, federal or state,

finds it necessary to take private property for public use it must obey the constitutional injunction to make or secure just compensation to the owner." Page 593.

II.

The President Was Authorized to Requisition Plaintiff's Contract.

Congress by the Act of June 15, 1917, conferred this authority upon him in definite terms.

"The president is hereby authorized and empowered within the limits of the amounts herein authorized—

(b) to modify, suspend, cancel or requisition any existing or future contract for the building, production or purchase of ships or material.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy or requisition, acquire or take any plant or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation therefor to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid 75% of the amount so determined by the President, and shall be entitled to sue the Unied States to recover such further sum as added to said 75% will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, paragraph 30, and Section 145 of the Judicial Code.

The President may exercisethe power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine."

III.

The Contract Was Taken.

The contention of the United States is that it requisitioned the ship under construction and the material for building it only, and that it did not take the plaintiff's contract, or any right or interest it had in the ship under that contract.

The plaintiff insists that its contract and all its rights and interests under it were taken.

The Court of Claims found as facts that on August 3rd, 1917, the plaintiff was the owner of the construction contract in the Findings described under which the New York Shipbuilding Corporation had obligated itself to build according to plans and specifications which formed a part of the contract, and to deliver to the plaintiff on or before February 1st, 1918, the steam ship described therein, and then known as Hull 193 of the capacity of 8,597 d. w. t. tons, for the contract price of $831,630, which the plaintiff had obligated itself to pay therefor, and that this ship was then in process of construction in the yard of the Shipbuilding Corporation, and about 19% completed.

Neither party was in default under this contract. The plaintiff had paid $419,500 of the con-

tract price, and was ready and able to pay the balance.

The Shipbuilding Corporation was ready and able to comply with the contract on its part, and to complete and deliver the ship. It had in its yard and under commitment the material required to complete the construction, and the same was thereafter used for that purpose.

On August 3rd, 1917, the Emergency Fleet Corporation served on the Shipbuilding Corporation, and on August 28, 1917, upon the plaintiff, the notice of requisition which appears on page 11 of the record, and therein ordered the Shipbuilding Corporation to complete the construction of this ship.

On August 22nd, 1917, the Emergency Fleet Corporation served upon the Shipbuilding Corporation the order on pages 14 and 15 of the record, in which it said:

> "You are further ordered by the President of the United States represented by this Corporation to proceed in the work of completion heretofore ordered *in conformity with the requirements of the contract, plans and specifications* under which construction proceeded prior to the requisition of August 3rd, 1917, in so far as the said *contract* describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification and survey thereof, including the meeting of the requirements of the said *contract* and all tests as to efficiency and capacity of the ship on completion and in so far as the *contract* contains provisions for the benefit and pro-

tection of the person with whom the contract was made.

For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the *contract* and not yet paid."

On September 13, 1917, the Emergency Fleet Corporation directed the Shipbuilding Corporation to receive no further payments from the plaintiff, and notified the plaintiff of this direction. (p. 16.)

The Emergency Fleet Corporation paid to the Shipbuilding Corporation for the completion of the construction $412,130, which was the balance of the contract price unpaid on August 3rd, 1917, and took credit for and appropriated to its own use the $419,500 which the plaintiff had paid thereon prior to that date.

From the Findings of Fact it necessarily follows as a conclusion of law that, the United States did take over, appropriate and use the plaintiff's contract and all its rights thereunder.

1st:—

In the notice dated August 3rd, 1917, addressed to the builder the Emergency Fleet Corporation says:

"All power-driven, cargo-carrying and passenger ships above 2,500 tons d. w. t. capacity under construction in your yard and certain machinery, equipment, outfit and commitments for materials, machinery, equipment and outfit necessary for their completion are hereby requisitioned by the United States.

> You are hereby required TO COMPLETE THE CONSTRUCTION of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.
>
> The compensation to be paid will include ships, materials and CONTRACTS requisitioned."

It then directs the builder to furnish plans and specifications, copies of contracts, particulars as to payments made, name of owner and date of completion, amounts still due, and all information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and CONTRACTS.

This order "to complete the construction of the ship" was manifestly an order to finish the construction which the builder had begun in accordance with the contract. The builder could not "complete the construction" without the use of the contract and plans and specifications, nor could the Emergency Fleet Corporation ever determine whether the construction had been completed without them.

The compensation to be paid included ships and CONTRACTS.

The builder was directed to furnish copies of CONTRACTS and

> "any other information necessary to a determination of the obligations of the Emergency Fleet Corporation in taking over these ships and CONTRACTS."

The order of August 22nd, is still more specific and directs the builder "to proceed in the work of completion heretofore ordered in conformity with the requirements of the CONTRACT, PLANS and SPECIFICATIONS under which construction proceeded prior to the requisition of August 3rd, 1917, in so far as said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification and survey thereof, including the meeting of the requiremnets of said CONTRACT and all tests as to efficiency, capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the CONTRACT was made.

All work will proceed under the inspection of such persons as have been or may hereafter from time to time be designated by this Corporation for that purpose.

For the work of completion heretofore and herein ordered the Corporation will pay to you amounts equal to payments set forth in the contract and not yet paid." (p. 15.)

Here is a positive recognition of the existence of the contract, and a statement that the United States took the place of the plaintiff under it, and would designate the inspectors and make the "payments set forth in the contract and not yet paid." Here is also a positive direction to the Shipbuilding Corporation to proceed with the completion of the construction in "conformity with the require-

ments of the contract, plans and specifications" in every respect except that it was to receive from the Emergency Fleet Corporation unpaid payments of the contract price and directions as to inspection.

The inspection service had been furnished by Bureau Veritas under a contract with the plaintiff and its assignor, and this service was in fact continued and furnished by the same party from the commencement of the construction until its end. (P. 14; 17.)

On September 13, 1917, the Emergency Fleet Corporation directed the Shipbuilding Corporation to accept no further payments from the plaintiff, and notified the plaintiff of this direction.

The construction of the ship proceeded under these orders of the Fleet Corporation for about four months when that Corporation made a contract dated December 8, 1917, again requiring the builder to complete the construction of this Hull 193 and others, "in accordance with the specifications annexed to the respective contracts under which said hulls were being constructed prior to August 3rd, 1917," and agreeing to pay the builder a bonus of $10.00 per d. w. t. ton, and providing that the Fleet corporation should have credit for all sums theretofore received by the Shipbuilding Corporation from former owners. It also agreed to indemnify the Shipbuilding Corporation from all loss or liability occasioned by the requisition order of August 3rd, 1917, or any other act or order of the Fleet Corporation arising out of claims of the

former owner or owners, or any one claiming under them. (p. 19; 20.)

This contract does not change the situation at all so far as the plaintiff's rights are concerned.

The plans and specifications were a part of the plaintiff's contract and a material and necessary part of it in the work of completion of the construction, and this agreement of December 8th really reaffirms the existence of that contract.

The defendant made itself the successor of the plaintiff under the contract—the owner of plaintiff's rights. It could have become such owner in no way other than by the condemnation and taking of the contract.

The defendant did not cancel this contract. It kept it alive and used it with every obligation of the Shipbuilding Corporation under it.

Chief Justice Campbell of the Court of Claims in his opinion in this case at page 30 of the Record says:

> "In other words, the Fleet Corporation agreement was to have the vessel completed in accordance with plaintiff's contract, plan, and specifications; to pay therefor plaintiff's contract price (with a bonus added) and then, in settlement for the completed vessel, to take credit to itself for the amounts plaintiff has paid. And this plan was consummated. Another provision of this contract was that the Fleet Corporation agreed to indemnify and save harmless the builder from any and all loss or liability occasioned by reason of the 'requisition order of August 3,' or any subsequent acts or orders given by the Fleet Cor-

poration 'arising out of claims of the former owner.' "

If the plaintiff had voluntarily assigned its contract with the builder to the Government, and the latter had expressly assumed the unfulfilled obligations and, later received the completed vessel, it would not more effectively have acquired plaintiff's contract, its rights, and obligations than actually resulted from what was done in this case. The Government requisitioned the incomplete vessel with the purpose of requiring the completion in accordance with the existing contract; it did require the carrying out of that contract (with slight modification); it took plaintiff's right to have the vessel; it received the vessel and appropriated plaintiff's partial payments thereon to its own use and benefit. The contract was performed; the vessel was delivered. I think the plaintiff's contract was taken and appropriated."

2nd:—

The natural, direct and inevitable effect of what the defendant did was the appropriation by the defendant of plaintitff's contract for public use.

When the defendant displaced the plaintiff under this contract and took that place itself, and exercised all the rights the plaintiff had under it, and agreed to pay to the builder and did pay the balance of the installments of the contract price unpaid at the time of the requisition on August 3rd, 1917, it took over and appropriated this contract and all the rights and interests the plaintiff had in it.

The defendant could not requisition and take the uncompleted ship, as it did do, and order the builder to complete the construction of it in accordance with this contract and the plans and specifications which were a part of it, pay the builder the balance of the contract price unpaid, and appropriate the amount which had been paid by the plaintiff, and receive from the buider the ship completed in accordance with the contract with no change whatever except a slight change for the military protection of the vessel, without taking this contract within the meaning of the 5th Amendment.

No other conclusion can follow from the facts found.

For the defendant took and used the plaintiff's plans and specifications, its service of inspection and classification of the vessel, its insurance while under construction, the guaranty of materials and labor, the vessel when completed, the payments made by the plaintiff to the builder, all of which were valuable rights of the plaintiff under the contract, and there was no provision of the Act of June 15, 1917, under which these rights could have been taken without taking the contract itself. They were essential parts of the contract and could not have been separated from it.

The defendant could not have used these rights as it did unless it had taken the contract itself.

3rd:—

Although under this contract the legal title to the ship during its construction was in the Ship-

building Corporation the plaintiff then had such substantial rights and equities in the uncompleted ship as the courts recognize and protect.

The parties to the contract evidently understood this for they provided in it that the builder should keep the vessel insured at all times during the construction in an amount at least equal to payments made by the plaintiff with loss if any payable as their interests might appear.

A ship is personal property of such peculiar character that both in England and in this country an action for specific performance of contracts relating to it will lie.

Lynn vs. Chaters, 2 Keen 521.
Claringbold vs. Curtis, 21 L. J. Ch. N. S. 541.
Duff vs. Fisher, 15 California 381.
Peer vs. Kean, 14 Mich. 354.
Menier vs. Donald, 165 N. Y. Supp. 50.
Great Lake & St. L. Transportation Co. vs. Scranton Coal Co. 239 Fed. 603.
L. R. A. 1918 E, 621.

In Menier vs. Donald, decided in 1917, upholding a decree for the specific performance of a contract for the sale of a steamship, the court said that there is authority both in this country and in England for the proposition that a ship is a special kind of personalty which in itself may justify a decree for specific performance, but added that even if this were not so the allegations of the complaint as to the peculiar value of the ship to the plaintiff, and the difficulty of replacing it or deter-

mining its value, and his damages under present conditions (referring apparently to the conditions created by the war), were amply sufficient to sustain the complaint.

In Lynn vs. Chaters, it was held that specific performance would lie at the instance of the vendors to enforce a contract for the sale of a ship.

In Claringbold vs. Curtis, specific performance was granted at the instance of the purchaser of a contract for the sale of a barge.

In Peer vs. Kean, the court upheld the right to specific performance of an agreement for the conveyance of a one-half interest in a boat, and alluded to the fact that the property was of peculiar nature, difficult of valuation or substitution.

In Great Lake & St. L. Transportation Company vs. Scranton Coal Co., the Circuit Court of Appeals of the 5th Circuit affirmed a preliminary injunction granted at the instance of the plaintiff, who had contracted for the use of certain boats on the Great Lakes for three years, restraining the defendant from selling them or sending them into European waters, and held that the plaintiff was entitled to a specific enforcement of the contract.

4th:—

This contract and the rights of the plaintiff thereunder were so connected with and involved in the ship itself, that the requisition of the vessel under construction was a taking and appropriation of

the contract, and all plaintiff's rights under it including its equitable rights and interests.

This is true whether the United States made use of the contract thereafter or made it valueless to the plaintiff.

U. S. vs. Lynah, 188 U. S. 445.

Pumpelly vs. Green Bay Co., 13 Wallace 166.

Chappell vs. U. S., 34 Fed. 673.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685.

Cincinnati vs. Louisville & Nashville R. Co., 223 U. S. 390.

Monongahela Navigation Co. vs. U. S., 148 U. S. 312.

In U. S. vs. Lynah, it is held that where the United States by the construction of a dam in the Savannah River caused the flooding of lands belonging to Lynah to such an extent as to totally destroy their value, the lands were in contemplation of law taken and appropriated by the government.

In Pumpelly vs. Green Bay Co., the State of Wisconsin in improving the navigation of Fox River erected a dam which resulted in flooding plaintiff's land to such an extent as to impair its usefullness, and make it practically valueless, and the Court held that this was taking within the meaning of the 5th Amendment.

In Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685, the City sought to condemn the

property of the Water Company which had a contract with the Town of New Lots for hydrant rent for 25 years, and the Water Company claimed the City had no right to condemn this contract.

It was held that the contract was property and could be taken under condemnation proceedings for public use, subject to the rule of just compensation, and it was appropriated when the tangible property was condemned, and the contract thus made valueless to the owner, and the court said:

> "The true view is that the condemnation proceedings, do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses."

In Cincinnati vs. Louisville & Nashville Ry. Co. 223 U. S. 390, the question of the condemnation of a right of way for an elevated railroad across the public landing at Cincinnati which had been dedicated by the original proprietors "as a common for the use and benefit of the town forever" arose.

It was held that this dedication constituted a contract binding upon the City, but that the contract nevertheless could be condemned.

Here the Railway Company made no use of the dedication which the court said was a contract, and no use of the property for the purposes of a common, but the appropriation of it for a right of way terminated the contract to the extent of the portion of the landing taken for the right of way, at least.

In Monongahela Navigation Co. vs. U. S., 148 U. S. 312, the United States had taken over by its power of eminent domain Lock and Dam No. 7, belonging to the Monongahela Navigation Co. That Company had been granted by the legislature of Pennsylvania the right to construct dams and locks upon the Monongahela River, and the result of the construction of these dams and locks greatly increased the commerce carried upon that river and the tolls received by the Company were very valuable.

In providing for the condemnation of Lock No. 7, congress provided that nothing should be paid by the United States for the franchise to collect tolls. The physical value of the Lock and dam was found upon the trial without taking into consideration the franchise. The Company insisted that the value of the franchise must be taken into consideration.

It was held by the Supreme Court that the Company's franchise was its contract with the State, was property, and that the United States could not lawfully take over the physical property of the corporation without paying just compensation for the contract as well as for the actual physical property, and the court said:

> "Because congress has the power to take property it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. * * *

> But this franchise goes with the property and the Navigation Company which owned it is deprived of it. The government takes it away from the Company whatever use it may make of it and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect toll just compensation requires payment not merely of the value of the tangible property itself but also of that of the franchise of which he is deprived."

In this case the United States was required to pay compensation for the franchise, that is, for the contract as well as for the actual physical property taken.

In the case at bar it was conceded by the defendant and found by the Court of Claims that the Government did requisition the ship under construction.

It requisitioned then the plaintiff's equitable rights and interests in the ship springing out of the contract in any event.

And if by taking the ship it rendered the contract and the obligation of the Shipbuilding Corporation under it valueless to the plaintiff it thereby appropriated the contract, whether it used the contract thereafter or not.

IV.

Omnia Case Distinguished.

Omnia Commercial Company vs. U. S., 261 U. S. 502, does not rule the case at bar.

In that case the plaintiff owned a contract made in May 1917, under which it had the right to purchase a quantity of steel plate from the Allegheny Steel Company. In October, 1917, before any delivery had been made under the contract the United States requisitioned the entire product of the Steel Company for the year 1918, and directed that Company not to comply with the plaintiff's contract, and threatened if it did do so to take over and operate for public use its entire plant.

In that case no specific steel plate had been appropriated to the plaintiff's contract, and no part of the purchase price had been paid. The Omnia Company had no equitable title or interest in the steel plate, and specific performance of its contract could not be enforced.

Here in the case at bar the subject of the contract was a specific and definite artitcle of property—a ship under construction, specifically appropriated to and involved in the contract.

The plaintiff had paid more than half of the contract price.

The property was of such a character that the plaintiff had the right to a specific performance of the contract. It had an equitable title and interest in the ship.

There the United States dealt only with the Steel Company.

Here it dealt with both parties to the contract, the plaintiff and the Shipbuilding Company.

There the United States did not step into the shoes of the plaintiff under the contract and use it.

Here the Government took over and used the plaintiff's contract, and all the obligations of the Shipbuilding Corporation under it. It put itself in the place of the plaintiff under the contract, assumed and agreed to pay the Shipbuilding Corporation the balance of the contract price unpaid, and caused the Builder to complete the construction under the contract. The construction was so completed. The United States paid the builder the balance of the contract price, and the builder delivered the ship to the United States.

There the contract was made simply unenforcible as between the Omnia Company and the Steel Company.

Here the contract was kept alive for the use of the Government and used.

There the damages resulting to the Omnia Company were merely consequential.

Here the loss to the plaintiff was the natural, direct and inevitable result of what the defendant did.

There the contract was destroyed under the police power of the United States.

Here the contract was taken under the right of eminent domain.

This suit is a part of the authorized procedure initiated by the United States for the condemnation of the ship and all the rights and interests of the plaintiff under the contract.

Seaboard Air Line Ry. Co. vs. United States, 261 U. S. 299; 305.

V.

Just Compensation.

At the time of the requisition on August 3rd, 1917, the plaintiff was the owner of the contract for the construction of the ship made fourteen months prior to that date, under which the construction had progressed and was then progressing. The Shipbuilding Corporation had procured by commitments and actual deliveries all materials required for the construction. The plaintiff had furnished plans and specifications, and then owned an equitable title or interest in the ship under construction.

It was entitled under the contract to the delivery of the ship completed on February 1st, 1918, upon payment to the builder of the balance of the contract price, which was $412,130.

The market value of this ship on August 3rd, 1917, was $1,719,400, and its value on the 1st of February, 1918, was the same amount.

We insist that the value to the plaintiff of this contract and its rights and interest in the ship under the contract, was the difference between the value of the ship and the amount which the plain-

tiff was then required under the contract to pay in order to get it, that is, $1,719,400 less $412,130, or $1,307,270.

Just compensation is the value to the owner at the time of the taking of the property taken.

Monongahela Navigation Co. vs. U. S., 148 U. S. 312; 326.

Seaboard Air Line Co. vs. U. S., 261 U. S. 299; 304.

U. S. vs. Rogers, 257 Fed. 397; 400.

Sanitary District of Chicago vs. Pittsburgh Ry. Co., 216 Ill. 574; 584.

United States vs. New River Colleries, 262 U. S. 341; 343.

In Monongahela Navigation Co. vs. U. S. 148 U. S. 312, this Court said:

> "The question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken."

In Seaboard Air Line Ry. Co. vs. U. S., 261 U. S. 299; 304, this Court said:

> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken.
>
> It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."
>
> U. S. vs. Rogers, 257 Fed. 397; 400.

In U. S. vs. New River Colleries, 262 U. S. 341; 345, this Court said:

"The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken.

The war or conditions which followed did not suspend or affect the Statute or the 5th Amendment. The owner was entitled to what he lost by the taking."

In Sanitary District of Chicago vs. Pittsburgh Ry. Co., 216 Ill. 574; 584, the Court said:

"The constitution and the law require that the owner shall receive such compensation that he will be as well off after the taking as he was before. In order to do this it is necessary to determine what the property was worth to the owner, and unless he receives what it was worth to him he does not receive just compensation."

The contract was worth to the plaintiff on August 3rd, 1917, the amount above stated.

No less sum would be a full money equivalent for the property which the government took on that day from the plaintiff, and the plaintiff is entitled to interest on that amount from August 3rd, 1917.

VI.

INTEREST.

The plaintiff is entitled to interest as a part of its just compensation upon the value of the property taken from the date of the requisition.

Seaboard Air Line Ry. Co. vs. U. S., 261 U. S. 299.

United States vs. Benedict, 261 U. S. 294.

Prince Line vs. U. S. 283 Fed. 535.

U. S. vs. Rogers, 255 U. S. 163.

The plainttiff was entitled to judgment for $1,719,400 less $412,130, the balance of the contract price unpaid on August 3rd, 1917, and less $332,012.87 the amount paid by the defendant February 24, 1920, or $975,257.13, and in addition thereto interest as a part of plaintiff's damages.

We respectfully submit that the judgment of the Court of Claims should be reversed.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

BROOKS-SCANLON CORPORATION, APPELLANT,
v.
THE UNITED STATES. } No. 367.

THE UNITED STATES, APPELLANT,
v.
BROOKS-SCANLON CORPORATION. } No. 385.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

1. *Pleadings.*—This cause is here on the appeal of the claimant and the cross appeal of the United States. It appears from the petition (p. 5) that the theory on which the suit was brought is that the United States through the Emergency Fleet Corporation under the Act of June 15, 1917 (40 Stat. 183), requisitioned certain property of the claimant on August 3, 1917. While not so specifically alleged, it clearly appears that the property claimed to have

been requisitioned was a contract for building a vessel, made between the claimant's assignor and the New York Shipbuilding Corporation. The claimant alleges that the value of this property was, at the date of requisition, $1,737,120 (p. 5) that it received on account thereof two payments from the Emergency Fleet Corporation, one of $132,922.83, and another of $199,090.04. Both of these payments were made on or about February 24, 1920. The claimant prays judgment for $1,404,118, which is very nearly the difference between the total of the two amounts so paid, $332,012.87, and the alleged value of the property on the date of requisition, $1,737,120. It is further alleged in the petition that the claimant has repeatedly attempted to secure an adjustment of its claim against the United States with the Fleet Corporation, but has failed to obtain any reasonable or just compensation (pages 5 and 6).

The general traverse was entered under Rule 34 (p. 8). Thereby the allegations of requisitioning of property of the claimant were denied and claimant put to its proof.

2. *Findings of fact.*—The findings of the Court below in so far as material may be summarized as follows: On March 28, 1916, a written contract was made between the New York Shipbuilding Company and the East Coast Transportation Company, claimant's assignor, whereby the Shipbuilding Company agreed to construct a steamship of about 8,100 deadweight tons and the Transportation Company agreed to pay the sum of $595,000 therefor in installments,

the ship when completed to be delivered at the dock of the builder on or before February 1, 1918. (Finding II, page 9.)

This contract is incorporated by reference in the second finding and is printed in full at pages 33–36.

On May 24, 1917, the East Coast Transportation Company transferred all its right, title, and interest in this contract to the claimant under its former corporate name, Carpenter-O'Brien Company. (Finding IV, page 10.) Prior to this assignment, the deadweight tonnage was increased to 8,597 tons, and the price to $811,130. (Finding III, page 10.)

On July 11, 1917, the President under authority of the Act of Congress of June 15, 1917 (40 Stat., 182), by executive order, delegated the powers thereby conferred upon him to the Fleet Corporation and Shipping Board. Acting under such authority the Shipping Board requisitioned all power-driven, cargo-carrying, and passenger ships above 2,500 tons deadweight capacity under construction in the yard of the Shipbuilding Corporation, and certain materials, machinery, equipment, and outfit necessary for their completion. (Finding V, page 10.)

The requisition order reads as follows (Findings V and VI, pp. 10, 11):

> UNITED STATES SHIPPING BOARD,
> EMERGENCY FLEET CORPORATION,
> *Washington, August 3, 1917.*
>
> By virtue of an act of Congress approved June 15, 1917, entitled "An act making appropriations for the Military and Naval Establish-

ments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes, and by authority delegated to the United States Shipping Board Emergency Fleet Corporation, under Executive order of the President dated July 11, 1917, all power-driven, cargo-carrying, and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction, and will prosecute such work with all practicable dispatch.

The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

You will report immediately whether any additional contracts are under consideration

and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

(Signed) W. L. CAPPS,
General Manager United States Shipping Board Emergency Fleet Corporation.
WASHINGTON, D. C., *August 3, 1917.*

Finding 6, pages 11–13, has been amended by a stipulation printed and annexed to the transcript of record (pp. 38, 39). As so amended this finding is to the following effect:

On August 28, 1917, the Fleet Corporation issued and served on the plaintiff, the following letter (page 12):

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
Washington, August 28, 1917.

CARPENTER–O'BRIEN COMPANY,
8 West 40th Street, New York City.

DEAR SIRS: On August 3, 1917, the United States Emergency Fleet Corporation issued to the New York Shipbuilding Corporation the notice or requisition set forth in enclosure (a).

In response to this communication the New York Shipbuilding Corporation, the shipbuilders, informed us that the East Coast Transportation Company, as owners, or representatives of owners, had entered into a contract with them for the following vessel:

Hull No. 193; type, cargo; D. W. ton., 8,100; date of contract, 3–28–16 (assigned 5–24–17).

Under date of August 23rd you advised that this contract had been assigned to you.

The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. Will you please inform the district officer, Mr. G. R. McDermott, at room 302, 1319 F St. NW., Washington, D. C., the names of your representatives and their compensation, sending a duplicate to this office. Your cooperation with the corporation is invited.

The corporation will consider payments to the contractor accruing since the date of requisition upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original vouchers and receipts and should be verified under oath by the proper corporate officer of your company.

It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if after investigation of data submitted by you such payments

are found in order and in conformity with the contract requirements.

At your further and early convenience you are requested to submit to the corporation a statement of such indirect expenditures as you have made on account of each vessel; for instance, the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

It will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above. The corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

The consummation of the orders herein and heretofore transmitted will be made the subject of later appropriate corporate action.

Very truly yours,

W. L. CAPPS,
General Manager.

Enclosed in this letter was a copy of the requisition order of August 3, 1917, which is the enclosure referred to as "Enclosure A" in the first paragraph of the letter. This copy of the requisition order was identical with that issued to the shipbuilder on August 3, 1917, and above quoted, with the excep-

tion that it bore date August 28, 1917, and was addressed to "Carpenter-O'Brien Company, re: New York Shipbuilding Corporation." On August 18, 1917, the Fleet Corporation had issued and served on the plaintiff's assignor, East Coast Transportation Company, a duplicate of the letter sent to the Carpenter-O'Brien Company on August 28th, the only changes being in the date and name of addressee. Enclosed in this letter and marked "Enclosure A" was an identical copy of the requisition order which was served on the shipbuilder on August 3, 1917, with the exception that this copy bore date August 18, 1917, and was addressed to "East Coast Transportation Company, re: New York Shipbuilding Corporation."

On August 22, 1917, a letter issued by Admiral Capps, General Manager of the Fleet Corporation to the District Officer, George R. McDermott, was by the latter sent to the Shipbuilding Corporation. This letter states, among other things, that the shipbuilder is informed that the ships under construction at its plant have been requisitioned and title thereto taken over by the United States. The contractor is ordered by the President, represented by the Fleet Corporation, to proceed in the work of completion theretofore ordered, in so far as the contract made prior to August 3rd describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, and classification, including the meeting of the requirements of the contracts in all tests, and in so far as the contract contains provisions for the benefit and

protection of the person with whom the contract was made, *but not otherwise.** (Finding VIII, page 15.)

On December 20, 1917, the shipbuilder, by letter, accepted the order of August 22, 1917, and agreed upon completion of the vessel to deliver a bill of sale thereof without prejudice to the claim of the person or corporation who had originally contracted for the construction of the vessel. (Finding IX, page 16.) On September 13, 1917, the Fleet Corporation instructed the Shipbuilding Corporation by telegram not to accept any further payments from "former owners on account of requisitioned ships." (Finding X, page 16.)

It is further found that the claimant was never in default, and had on deposit sufficient funds to pay all of the installments under its contract with the shipbuilder. (Finding XI, pages 16 and 17.) The court found further that the Shipbuilding Company, upon the execution of the construction contract with the claimant's assignor, in its own name and on its own credit, ordered all the material and equipment, and before August 3, 1917, it made commitments for all the material, etc., needed for the completion of the vessel, that all such materials were duly delivered to the shipbuilder (both before and after August 3, 1917), and used in the construction of the ship, and it is expressly found that—

> The title of these materials was in the New York Shipbuilding Corporation on August 3, 1917, * * * and the plaintiff never had

*Italics ours throughout except as otherwise indicated.

> nor claimed any title in and to these materials either before or after the date of the requisition order. (Finding XII, page 17.)

The court further found that to and including August 3, 1917, between 35% and 40% of the necessary material, valued at about $118,000, and labor at about the amount of $24,000, had been delivered for use and used in the construction of the ship, and on that day the ship was about 19% completed. The ship was thereafter substantially completed by the use of all such material, etc., was launched July 6, 1918, and was delivered to the United States September 20, 1918. (Finding XIII, page 17.)

It is further found that on December 8, 1917, the Fleet Corporation made a contract with the New York Shipbuilding Corporation and the American International Corporation. The portions of the contract, deemed by the court relevant, are set out in the 16th Finding, pages 18 and 20, inclusive. From this contract it appears that ten vessels, of which the one under contract to claimant was one, were under construction, that the parties desired to fix the just compensation of the Shipbuilding Corporation; it was fixed with respect to each ship on the basis of the entire cost of construction—

> figured from the commencement by the Shipbuilding Corporation of the construction of said ten ships up to the times of completion thereof respectively, and in addition thereto, with respect to each ship ten dollars ($10)

> per deadweight ton for profit. There shall be credited, however, in favor of the Fleet Corporation all sums heretofore received by the Shipbuilding Corporation on account of the construction of such ten ships, either from the former owners or from the Fleet Corporation. (Finding XVI, Par. 2, page 19.)

A portion of paragraph 10 of this agreement embraced in the 16th Finding of Fact reads as follows:

> The Fleet Corporation, in accordance with the provisions of the said urgent deficiency act of June 15, 1917, hereby agrees to indemnify and save harmless the Shipbuilding Corporation from any and all loss or liability occasioned by reason of said requisition order of August 3, 1917, or any subsequent acts or orders given by the Fleet Corporation arising out of claims of the former owner or owners or anyone claiming under them.

Incorporated in the contract was a statement of the amount received by the Shipbuilding Corporation from the various persons with whom it had contracted to build the ten vessels specified, including the vessel involved in this suit. The amount received with respect to this vessel was stated to be $419,500. (Finding XVI, page 20.) The court further found (Finding XVII, p. 21) that the plaintiff on August 3, 1917, in accordance with the statute filed a claim for just compensation with the Fleet Corporation for the property alleged to have been requisitioned from it and that on January 23, 1920, the Fleet Corporation adopted a resolution awarding the claimant as just

compensation the sum of $442,683.82. The claimant was notified, declined to accept the award, and the United States paid the claimant 75% thereof, namely, $332,012.87. This award was made up of two items: $177,230.44, the value of the materials in the yard of the Shipbuilding Company at the time of requisition, which materials were then in fact the property of the Shipbuilding Corporation and not of the claimant; $265,453.38 on account of progress payments made by the claimant and its assignor to the Shipbuilding Corporation in excess of cost of material requisitioned. (Finding XVII, page 21.) It is further found that the claimant and its assignors paid the Shipbuilding Corporation $239,500 in cash, $180,000 in notes, and that it made payment of interest on notes of $28,433.33, total principal and interest, $447,933.33. It is also found that the claimant paid $5,500 to architects and furnished plans and specifications of the value of $20,277.25, making in all $473,710.58, and that it has been paid by the defendant the sum of the two payments above mentioned, being 75% of the award, $332,012.87.(Finding XVII, page 21.)

The court further found that if the ship had been completed on August 3, 1917, its value would have been $1,719,400 on that day, that the value of ships, such as the one under construction, on February 1, 1918, the date on which it was to have been completed, was $200 per deadweight ton, that the contract price for building the ship was $831,600, that the plaintiff had paid the sum of $453,433.32, and the

defendant after requisition paid for construction thereof $412,130, making the amount paid for the construction of the ship, $865,563.33, and that the difference between the last-named amount and the value of the completed ship (as of August 3, 1917) is $853,836.67. (Finding XVIII, page 21.)

Upon the facts so found the Court held as its conclusion of law that the plaintiff was entitled to recover from the United States $473,710.58, less $332,012.87, and "as part of just compensation to which it is entitled," interest on $445,277.25 from August 3, 1917, to February 24, 1920—$68,350.06, and interest on $113,264.38 from February 24, 1920, to April 23, 1923, $21,501.35, making in the aggregate $231,549.12 for which judgment was entered. (Conclusion of law, pages 21 and 22.)

The amounts involved in the 17th finding and conclusion of law are for convenience restated in tabulated form as follows:

Credits allowed to plaintiff:	
Total payments by the plaintiff and its assignor to the shipbuilder—	
Cash	$239, 500. 00
Notes	180, 000. 00
Interest on notes	28, 433. 33
Architect's fees	5, 500. 00
Value of plans and specifications	20, 277. 25
Interest on $455,277.25 from Aug. 3, 1917, to Feb. 24, 1920	68, 350. 06
Interest on $113,264.38 from Feb. 24, 1920, to Apr. 23, 1923	21, 501. 35
Total credits	563, 561. 99
Debits:	
Moneys paid on account by United States through Fleet Corporation Feb. 24, 1920	332, 012. 87
Balance to credit for which judgment was entered	231, 549. 12

Judge Hay delivered the opinion (pages 22–28), which was concurred in by Judges Graham, Downey, and Booth. Chief Justice Campbell dissented (dissenting opinion, pages 28–30). The opinion of the Court, after a brief recital of the facts and of the contention of the plaintiff, states (p. 24) that—

> The questions to be determined are: Was there a requisitioning or taking of the contract by the United States, and if there was, what was the value of such contract at the time of the taking?

The court then quotes the provisions of the Act of June 15, 1917, and states (page 25)—

> The intent and purpose of the Shipping Board was, therefore, to requisition ships under construction, which was done in unmistakable language. It is admitted that the ships under construction, the materials, and so forth, in the yard of the New York Shipbuilding Corporation were the property of the corporation, and the title to that property was in the shipbuilding corporation alone. Among the ships under construction so requisitioned was hull 193, which the shipbuilding corporation was building for the Carpenter-O'Brien Corporation, but *it is not contended by the plaintiff that it had any title to or interest in said ship or the materials for its completion.*

The court then cites the decision of this court in *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, and states further (page 26):

> The subject matter in this case was the ship under construction, and that was what the Government requisitioned, not the contract which was the agreement and obligation to perform.

The court says further (page 26):

> The President in taking the ship exercised a power conferred upon him by Congress. If in exercising this power the plaintiff was deprived of any right it may have had under a contract had by it with the person from whom the ship under construction was taken, that does not impose upon the Government an obligation to pay the plaintiff for its right. The deprivation of the right of the plaintiff to have its ship built and delivered to it by the New York Shipbuilding Corporation was incidental to the taking of the ship from its builder and was not a taking of something for public use. * * * In exercising the war powers conferred upon it by the Constitution, Congress has legitimately exercised them in the act of June 15, 1917, and having legitimately exercised them, the injury to the plaintiff is only incidental to their exercise, and it is not entitled to compensation. *Morrisdale Coal Co.* v. *United States*, 55 Ct. Cl. 310 affirmed, 259 U. S. 188; *Pine Hill Coal Co.* v. *United States*, 55 Ct. Cl. 433, affirmed, 259 U. S. 191.

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So far, it is submitted, the opinion of the Court of Claims is entirely in accordance with the law as declared by this court. In the remainder of the opinion, from pages 27 and 28, the court erroneously holds (page 27)—

> When the Emergency Fleet Corporation requisitioned the ship under construction which the shipbuilding corporation had contracted to build for the Carpenter-O'Brien Company, it also took and appropriated, under its order of requisition, the payments which the Carpenter-O'Brien Company had made to the shipbuilding corporation, and also took over the plans and specifications which had been paid for by the last-named company.

The court, assuming (erroneously, it is submitted) that the plaintiff's money was requisitioned, concludes that under the decision of this court in *Seaboard Airline Railway Co.* v. *United States*, 261 U. S. 299, 306, the plaintiff is entitled to interest on the sums requisitioned.

It is submitted that while this conclusion might arguably follow if the plaintiff's money had been requisitioned, it is entirely clear from the findings of fact that the only thing that was requisitioned was the vessel under construction, the equipment and materials assembled for construction, and the commitments or contracts made by the shipbuilder for the purchase and fabrication of such additional materials and equipment as had been ordered for this particular ship at the date of requisition.

First Point.

THE FINDINGS OF FACT CLEARLY SHOW THAT PLAINTIFF'S CONTRACT WITH THE SHIPBUILDER WAS NOT REQUISITIONED.

At the outset we point out that if plaintiff's contentions in this case should prevail and this court should hold (*a*) that plaintiff's contract was, in fact and in law, requisitioned and (*b*) that the just compensation for such requisition is the value of the contract at the date thereof, which is the same as the then value of the ship, which concededly was requisitioned, and (*c*) that plaintiff is entitled to interest upon such value from that date, the United States will in this case be required to pay the plaintiff upwards of $975,000 additional, with interest for over six years (appellant's brief, p. 36). Further that the cases in which Mr. King and others have filed a brief as *amici curiæ* involve several millions more (brief of *amici curiæ*, p. 9), while the amount involved in other similar cases now pending in the Court of Claims is, as justly remarked by this court in the *Omnia Commercial case*, (261 U. S. at 513) "appalling."

It is, therefore, important to note the intent of the Fleet Corporation as evidenced by its action as the delegate of the President under the Act of June 15, 1917.

This action completely negatives plaintiff's contention that its contract was requisitioned. The requisition order of August 3, 1917 states that—

> All power-driven ships under construction in your yard, and certain materials, machinery,

equipment, and outfit and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

* * * * *

The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned and copies of contracts and all supplemental agreements in reference thereto, and full particulars as to owner, date of completion, and payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligation of the Emergency Fleet Corporation in taking over these ships and contracts. (Quoted in full page 11, Finding VI, in part page 10, Finding V.)

The order is explicit in its specification of the property requisitioned: "ships, materials, machinery, equipment, and outfit" and "commitments for materials, machinery, equipment, and outfit necessary for their completion."

While the order refers to "contracts requisitioned" and to "ships and contracts taken over," the contracts here referred to are clearly, from the context, the commitments (necessarily by contract) for the materials, etc.

Until August 18, 1918, the Fleet Corporation had no dealings (so far as the record discloses) with plaintiff or its assignor.

On that day the Fleet Corporation wrote to the plaintiff's assignor, East Coast Transportation Company, a letter which is quoted in full on pages 12–13, Finding 6. The material portions of this letter read as follows:

> On August 3, 1917, * * * the Fleet Corporation issued to the New York Shipbuilding Corporation the notice or requisition set forth in Enclosure A.

Enclosure A, as appears from the stipulation of December 27, 1923 (record, pages 38 and 39), is a copy of the requisition order.

The letter continues:

> In response to this communication the New York Shipbuilding Corporation, the shipbuilders, informed us that the East Coast Transportation Company, as owners or representatives of owners, had entered into a contract with them for the following vessel.
>
> Hull No. 193; type, cargo, D. W. ton 8,100; date of contract 3–28–16 (assigned 5–24–17) * * *. You are requested as soon as possible to report to the Corporation a statement in detail of the payments already made by you * * * prior to the date of the requisitioning August 3, 1917 * * *. It is the present intention of the Corporation to reimburse you, so, after funds are available for the payments heretofore made to the shipbuilder, if after investigation of data submitted by you, such payments are found in order and in conformity with the contract requirements * * *. It will be perceived

> that the Corporation presumes it is addressing this letter to the owners or responsible representatives of the owners or persons entitled to receive compensation on account of the requisition of the vessels listed above. The Corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law (page 12).

On August 28, 1918, an identical letter and enclosure were sent to the plaintiff (stipulation pages 38 and 39). The Court of Claims found as a fact, Finding VII, that—

> On August 27, 1917, the Carpenter-O'Brien Corporation (plaintiff) forwarded to the Emergency Fleet Corporation a list of payments to the Shipbuilding Company as paid under requirements of the construction contracts, which statement was identical with that theretofore presented by the shipbuilding company to the Fleet Corporation on August 16, 1917, and as set forth in the contract between the Emergency Fleet Corporation and the New York Shipbuilding Corporation, dated December 8, 1917.

This contract is found as a fact and the material parts thereof are embodied in the sixteenth finding (pages 18–20). It seems clear from the facts so found that the Fleet Corporation had no intention of requisitioning the plaintiff's contract and that both as matter of fact and of law it did not requisition the same, and that this intention and action were clearly

understood by the plaintiff at the time. It does not in any way appear from the findings that the plaintiff then contended that its contract was requisitioned. On the contrary the effect of the portion of the Seventh Finding above quoted is that the plaintiff acquiesced in the requisition of the ship by the Fleet Corporation and furnished, as requested, a statement of the amounts which it had paid to the shipbuilder in apparent reliance upon the intention of the Fleet Corporation to reimburse it for such expenditures.

While by a subsequent contract of December 8, 1917, the United States through the Fleet Corporation agreed with the shipbuilding company that it should be credited under the terms of the construction contract then made with the amounts paid prior to August 3, 1917, by the plaintiff, these amounts of money were in no sense of the word requisitioned from the shipbuilder, much less were they requisitioned from the plaintiff. As between the Shipbuilder and the United States the latter agreed to indemnify the shipbuilder against the claim of the plaintiff. As between the United States and the plaintiff, the former stated in the letter of August 28, 1917, above quoted, that it was its intention to reimburse the plaintiff for all amounts paid by plaintiff to the shipbuilder as soon as such amounts should be ascertained. This intention was carried out by the Shipping Board when it made an award to the plaintiff of the moneys which it had actually paid to the shipbuilder, and in addition also for the increase in the value of materials assumed to have been purchased

with these particular moneys, but it is clear that the United States did not requisition anything whatsoever from the plaintiff.

Messrs. William B. King and others have filed a brief as *amici curiæ*. The statement on page 3 of this brief that the Fleet Corporation on August 18th and 28th served the requisition order on claimant's predecessors is no longer an accurate statement in view of the stipulation (printed at pages 37 and 38 of the record) by which the clerical error and omission in the 6th Finding of the Court of Claims are corrected. The requisition order was not served upon the claimant's predecessors, but was enclosed for their information in a letter under date of August 18 and enclosed in a similar letter to the plaintiff under date of August 28th.

Monongahela Navigation Co. v. *United States*, 148 U. S. 312, is relied on by plaintiff. It is clearly distinguishable for there the property was taken. In that case at page 337, this court said:

> So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take it is subject to the constitutional limit of just compensation. It should be noticed that here there is unquestionably a taking of the property and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What difference would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the govern-

ment in the exercise of its sovereign power, takes the property.

This distinction is further developed in the course of the opinion, at pages 338, 340, 341, by the full discussion and distinction of the case of *Bridge Company* v. *United States*, 105 U. S. 470.

Second Point.

THIS CASE IS CONTROLLED BY THE DECISION OF THIS COURT IN OMNIA COMMERCIAL CO. *v.* UNITED STATES, 261 U. S. 502.

That case has been so recently decided that it is unnecessary to discuss it at length further than to say that the Act of Congress under which the steel was requisitioned from the Allegheny Steel Company was either the act of June 15, 1917, here involved (40 Stat. 182–183, C. 29) or the Act of March 4, 1917 (39 Stat. 1193, C. 180), and that at the time of the requisition of the steel from the steel company the plaintiff or its assignors had paid large sums to the Steel Company on account of the purchase of the steel and had sold the same to responsible parties, and from these sales would have realized a profit of nearly a million dollars (page 503). The Act of March 4, 1917, referred to, under the caption "Naval Emergency Fund" contained provisions similar but in an abbreviated form, to those subsequently enacted by the Act of June 15, 1917, but it was provided that the authority thereby granted to the President of requisitioning, etc., should cease on March 1, 1918. These pro-

visions were amplified to continue in force until six months after the proclamation of the Treaty, by the Act of June 15, 1917.

In the *Omnia Commercial* case this court says (261 U. S. at 508),

> A question is raised as to the statutory authority of the officer who made the order of requisition and gave the directions respecting noncompliance with the contract to bind the Government, but for the purposes of the case, we assume he was authorized, as he could have been under 39 Stat. 1193, sec. 180, or 40 Stat. 182–183, sec. 29.

Recognizing the authority of the decision of this court in the *Omnia Commercial case,* the appellants attempt to distinguish it upon the theory that in the case at bar the contract was kept alive, because at the date of requisition, August 3, 1917, the shipbuilder was directed to proceed with the construction of the vessel and because subsequently and on December 8, 1917, the Fleet Corporation made a three-party contract with the shipbuilder and the American International Corporation whereby among other things the shipbuilder agreed to complete this hull and nine others (specified at page 18 of the record). It is, however, immaterial that a similar or even identical contract was subsequently made. The shipbuilder became bound to the United States by the covenants of this new contract and not by the covenants of the original contract with plaintiff.

In view of the decision of this court in the *Omnia Commercial case* we do not deem it necessary to refer in detail to the Norwegian Arbitration. The conclusions of the arbitration tribunal were before this court for consideration in the *Omnia Commercial case*, and in that case this court held directly to the contrary. Nor is it necessary to discuss the decision of the Court of Kings Bench in *Mercy Docks and Harbor Board* vs. *The Lord Commissioners of the Admiralty*, cited at pages 23–25 of appellants' brief. The recent consideration by this court of this same question in the *Omnia Commercial case* renders it unnecessary for us to discuss in detail the authorities claimed in the brief referred to to be contrary to that decision.

THIRD POINT.

IF THE ACTION WERE MAINTAINABLE ON THE THEORY OF REQUISITION OF PLAINTIFF'S CONTRACT, THE JUDGMENT SHOULD BE REVERSED AND THE CLAIM DISMISSED, BECAUSE AT THE DATE OF THE ALLEGED REQUISITION THE CONTRACT WAS WITHOUT VALUE.

There is no finding in the case to sustain the plaintiff's contention that it is entitled to a larger award of compensation than was made by the Court of Claims. While it is true that the court finds as a fact that the value of the ship, if completed on August 3, 1917, would have been upwards of $1,700,000.00, it by no means follows that even if the theory of just compensation for a requisition contract were applied to this case that the contract would then have had any such value, or indeed any value at all.

The amount of just compensation to which a plaintiff is entitled when his property is taken for public use is the market value of the property at the date of taking. The court may properly take judicial notice of the historical fact that on August 3, 1917, or within a few days thereafter every ship of over 2,500 deadweight tons capacity was requisitioned by the Fleet Corporation in behalf of the United States under the Act of June 15, 1917, by requisition orders substantially identical with the one issued to the shipbuilder in this case. Under these circumstances it can hardly be properly contended that the contract had any market value, for it was a contract impossible of performance. It may be that if there had been a free market and the ship had then been completed, the ship would have had this value, but the Court of Claims does not find as a fact that the contract on the date of requisitioning of the ships was of any value.

The court may, however, properly take judicial notice of the further historical fact that, at or about the time of the requisitioning of these ships, all shipbuilding material throughout the United States was likewise requisitioned by the Government, and particularly all steel and the entire steel industry were requisitioned, and no private shipbuilder was permitted to acquire any steel for shipbuilding for any but Government ships. Assuming then merely for the argument that there is a basis for the plaintiff's contention that the shipbuilding contract was requisitioned, the contract at the date

of requisition was valueless because it could not be performed by the shipbuilder.

L. Vogelstein & Company, Inc., v. *United States*, 262 U. S. 337–341. *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Pine Hill Company* v. *United States*, 259 U. S. 191.

The theory of the plaintiff confounds the subject matter of the contract with the covenants of perfomance.

Fourth Point.

THE COURT BELOW ERRED IN ALLOWING INTEREST (PARTLY COMPOUNDED) ON THE THEORY THAT THE PAYMENTS MADE BY THE PLAINTIFF TO THE SHIPBUILDER WERE REQUISITIONED.

If this were a case where private property had been taken for public use it may be conceded for the argument that the decision of this court in the *Seaboard Airline Railway Company case, supra*, would require an allowance of the award of some amount in addition to the value of the property taken, which additional amount would represent the damage suffered by the plaintiff through the delay in the receipt of the just compensation to which he was theoretically entitled upon the taking of his property. In the case at bar, however, as has been pointed out, it was the property of the shipbuilding company, namely, the ship under construction, the materials assembled for construction, and the additional materials under contract for such construction which were requisitioned and not the plaintiff's contract. While the

statute provides that in cases of cancellation of contracts as well as in cases of requisitioning of property the United States shall make "just compensation" therefor, and while this court has held in the *Seaboard Airline Railway Company case* that just compensation under the Fifth Amendment includes damages for delay, yet the term "just compensation" in the Act is obviously used in the constitutional sense of the word only in cases which come within the Amendment—that is to say, where the United States takes property, whether the property be a ship, material, or a contract.

As is pointed out by the opinion of this court in the *Russell Motor Car Company case*, the terms "modify" and "suspend" relate more properly to such contracts as the United States might itself make for ship construction, etc., than to contracts made prior to the date of requisition of a ship by the shipbuilder with a private purchaser. As further held in that case, the word "cancel" applies not only to contracts made between private individuals and shipbuilders for the construction of vessels but also to contracts made by the United States. Obviously from the necessities of the case the power of cancellation with respect to private contracts related to the governmental activities for the prosecution of the war during the period of active hostilities, while the power to cancel government contracts related rather to the period after the termination of hostilities, and from then until six months after the proclamation of the Treaty of Peace. As is further pointed out in the *Russell Motor Car*

case, the power of modification of a contract (except with the consent of the contracting parties) must be intended to relate to government contracts and not to private contracts, for it is difficult to conceive how the power of the government, even during war, could be exerted so as to compel individuals to modify contracts and to abide by them as modified.

The power to suspend contracts may equally well relate to private contracts as to government contracts. Occasion might well arise where the necessities of the government during the war would require the performance of a private contract to be suspended without it being necessary to order its cancellation. Similarly, on the termination of hostilities a vast number of governmental contracts were, by order of the Fleet Corporation, suspended until such time as it might be ascertained whether the necessities of the government would require performance on the one hand or cancellation on the other.

In all these instances of cancellation, suspension, and modification, it is clear that there would be no taking of private property for public use, there would be merely governmental action authorized by the Constitution and necessary or suitable for the prosecution of the war, or in relation to the cessation of hostilities, and the consequent necessity of relieving the government from the enormous obligations imposed by war-time contracts when it was evident that the property contracted for would no longer be required. Hence, it is submitted

that in all instances of cancellation and suspension of private contracts, such as the cancellation in the case at bar, the party for whom the contract was being performed did not have his property taken but the property was rendered valueless. In such a case, the right to sue the United States in the Court of Claims is not one founded on the Constitution—that is to say, a right to recover just compensation for private property taken for public use—but is a right founded solely on the terms of this statute, which provides that in all cases where private contracts are canceled the United States shall "make just compensation therefor." The further provisions of the act read that—

> If the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum will make up such amount as will be just compensation therefor in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

As the statute provides that the person shall be entitled to sue the United States under Section 145 of the Judicial Code, it is submitted that all other sections of chapter 7 of the Judicial Code relating to the Court of Claims must be applicable, including section 177, by which the Court of Claims is

prohibited from awarding interest. In the case at bar the Court of Claims held in substance that the United States requisitioned the plaintiff's money. This was clearly erroneous, as the title to the money passed from the plaintiff to the shipbuilding company at the time the money was paid. The United States did, however, by the requisition order of August 3, 1917, cancel the plaintiff's contract with the shipbuilder. Thereupon the plaintiff was out of pocket by the amount which it had paid to the shipbuilder. It may have had a valid cause of action against the shipbuilder for the repayment of this money. If so, the United States agreed to indemnify the shipbuilder against this claim, but under the terms of the statute the claimant was given the statutory right to be awarded just compensation for the cancellation of the contract. This right, however, was statutory, not constitutional, and, as the property of the plaintiff was not requisitioned or taken for public use, there is no sound theory of law on which it can be held as was held in the *Seaboard Air-line Railway case* that the suit in the Court of Claims should be regarded as the continuation of a condemnation proceeding initiated by the requisitioning or the taking of the property. The cause of action, therefore, on which the plaintiff might have sued, but did not, is based on cancellation of its contract with the shipbuilder, and as the plaintiff was given by the United States the right to prosecute this cause of action only in the Court of Claims or (within the jurisdictional limit of $10,000) in the district court

exercising the same jurisdiction as the Court of Claims, it must follow under the decisions of this court that Congress intended, by referring the case to the Court of Claims, to subject itself only to such judgment as the Court of Claims has power to render in other cases—that is to say, for the amount of the principal sum without interest.

The Merchant Marine Act, 1920, gave the Shipping Board the power to award just compensation, which by the Act of June 15, 1917, had been given to the President. The provisions as to suit in the Court of Claims were retained. Subsequent to the passage of the Merchant Marine Act, Congress by the Internal Revenue Act of 1921 (Act November 23, 1921, 42 Stat. 227, 316) amended Section 177 of the Judicial Code to read as follows:

> SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws.

The passage of this act, after that of the Merchant Marine Act of June 5, 1920, with the specification of one class of cases only in which interest may be

allowed (other than contracts "expressly stipulating for the payment of interest") is a further indication of the intent of Congress that interest shall not be allowed by the Court of Claims in cases, such as the case at bar, of cancellation of private contracts.

In *United States* v. *Bayard*, 127 U. S. 251, this court held that even in a case where a portion of moneys which had been awarded to a claimant were withheld by the Secretary of State and invested so as to produce an income, the claimant was entitled only to the principal and the claim for the income or interest must be disallowed. Similarly, in *United States* v. *North Carolina*, 136 U. S. 211, the bonds issued by the State under authority of its statutes contained a provision that they would bear interest from date "until the principal be paid." The statute, however, did not authorize interest beyond the due date of the bonds. This court held that under the principle that the sovereign does not pay interest except pursuant to an Act of its Legislature or by a lawful contract of its executive officers, interest was not allowable.

So in *Tillson* v. *United States*, 100 U. S. 43, Congress had referred a claim to the Court of Claims to investigate "and ascertain the amount equitably due as damages for an alleged breach of contract." It was contended that the use of the word "equitably" was intended to award interest, but this court, at page 46, held directly to the contrary. The whole topic has been elaborately examined by this court in an opinion written by Mr. Justice Brandeis in *United*

States v. *North American Transportation and Trading Company*, 253 U. S. 330. In that case this court held that where private property is taken for public use without a condemnation proceeding and the owner sues the United States, the cause of action is not founded upon the Fifth Amendment but on the existence of an implied contract entered into by the United States, and that the contract which is implied is to pay the value of the property as of the date of the taking. On this point the court says at page 336:

> Interest may not be added because § 177 of the Judicial Code, reenacting § 1091 of the Revised Statutes, declares that—
>
> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. *Tillson* v. *United States*, 100 U. S. 43."

It is submitted that the provisions of the act of June 15, 1917, negative the implication that it was the intention of Congress that in suits in the Court of Claims based on cancellation of contracts interest should be allowed. Obviously, if the claimant had accepted the full amount of the award made by the Shipping Board, that is, for the sums paid by the plaintiff to the shipbuilder, the claimant's acceptance of the principal would have barred its claim to the interest. *Stewart* v. *Barnes*, 153 U. S. 456. Here the claimant has accepted 75% of the award, yet the court below has allowed in-

terest not only on the remaining 25% but on the 75% from the date of requisition of the ship, August 3, 1917, to the date of the payment on February 24, 1920. This allowance of interest has been made despite the fact that the moneys of the claimant were not requisitioned at the date of requisitioning of the ship, and also despite the fact that the amount on which interest has been computed by the Court of Claims includes not only the $180,000 of notes which the plaintiff gave to the shipbuilder, but also interest on these notes to date of maturity. The interest on the notes to date of maturity has been added to the principal and interest has been allowed on this amount from August 3, 1917. The practical effect is that, on a substantial part of the claim, compound interest has been allowed—an allowance which is, of course, wholly without justification.

Fifth Point.

THE JUDGMENT BELOW, TO THE EXTENT THAT IT AWARDED THE BALANCE OF THE SUMS PAID BY PLAINTIFF TO THE SHIPBUILDER CAN BE SUSTAINED ONLY ON THE THEORY THAT PLAINTIFF, UNDER THE STATUTE, WAS ENTITLED TO COMPENSATION FOR THE CANCELLATION OF ITS CONTRACT.

We have referred to the pleadings in the Statement of Facts above because they show clearly that the whole theory of the plaintiff's case is that the United States requisitioned the plaintiff's contract, not the moneys paid to the shipbuilder, but the contract which the plaintiff had with the Shipbuilding Com-

pany, on the date of requisition of the ship, August 3, 1917. On this theory the plaintiff contends that it is entitled to the value of the contract on the day the ship was requisitioned. There is no claim here for an award of just compensation based on the cancellation of the contract. On the contrary, the plaintiff submitted its case to the court below on the theory of requisition and assigns error on the same theory. (See Appellant's brief, page 12.) The position of the Government is that while, as a matter of fairness and justness, the plaintiff should (in a suit brought on a proper theory), recover without interest the balance of the amounts which it paid to the shipbuilder for construction of the ship and for which amounts the Government received credit on its contract with the shipbuilder, it is not entitled to any allowance or award of judgment upon the theory adopted, namely, "requisition," and the Government submits to the court for determination the question as to whether upon this branch of the case where a claimant sues in the Court of Claims upon the theory of requisition, and the Court of Claims awards judgment on this theory, the judgment can be sustained upon another and inconsistent theory, namely, that of cancellation—a theory which, if adopted by the plaintiff, would have required the Court of Claims to award judgment for only the balance of the amount paid by the plaintiff to the shipbuilder without interest, an amount less than that awarded and tendered by the Shipping Board but refused by plaintiff.

It is not the desire of the Government to deprive the plaintiff of an award to which it is fairly entitled, but it is submitted that there is grave doubt as to whether the plaintiff is entitled to such award when he has proceeded upon a wholly different and inconsistent theory both in the court below and in this court. If this appeal had been taken by the plaintiff in a court in which the rules of pleading are followed, there could be little question but that the judgment below should be reversed on the appeal of the United States because it was not sustainable on the theory adopted by the plaintiff.

It is further submitted that the findings of the Court of Claims that the plans and specifications in the contract were ordered and paid for by the plaintiff and its assignors and were used after August 3, 1917, for the benefit of the Fleet Corporation (Finding 15, page 18), is inconsistent with the shipbuilding contract, Claimant's Exhibit 4, printed at pages 33–37 and embodied by reference in the 2d Finding, page 10. This contract expressly provides in the covenants that the contractor agrees to build a steamer—

> to be in all respects a duplicate of the Steamship *William O'Brien*, built at the yard of the contractor, and delivered to the owner about April 17, 1915, and the plans and specifications of the said Steamer *William O'Brien* are hereby referred to and form part of this agreement.

Reading these two findings together, the plaintiff did not furnish to the shipbuilder any new plans or

specifications, nor did the United States, through the Fleet Corporation, requisition any plans or specifications. They did not cost the shipbuilder anything, nor did they cost the plaintiff anything with respect to the vessel requisitioned in this case. The amount allowed for these plans, etc., is $20,277.25 with interest at 6 per cent. This allowance is unjustifiable. While it is found as a fact in Finding 17 that—

> The plaintiff also paid the sum of $5,500 to architects. The plaintiff also furnished plans and specifications of the value of $20,277.25.

It is submitted that this further finding with respect to the plans and specifications does not negative the effect of the contract between the plaintiff and the shipbuilder—that these plans had been furnished to the shipbuilder by plaintiff's assignor, East Coast Transportation Company, in connection with the building of another vessel.

The award made by the Fleet Corporation to the plaintiff on January 23, 1920, was excessive. A wrong theory was adopted and instead of allowing the plaintiff the amount of actual advances, namely, $419,000, the Fleet Corporation made an additional award of $23,183.82. The Court of Claims found that the total payments made by the plaintiff and its assignors were as follows:

Cash	$239, 500. 00
Notes	180, 000. 00
Interest on Notes	28, 433. 33
Total	447, 933. 33

It appears, however, from the contract, Plaintiff's Exhibit 4, page 33, that all of the notes were to

mature on February 1, 1918, the date fixed by the contract for the completion and delivery of the vessel, and that these notes were then to be refunded by serial coupon bonds (page 34). It is submitted that the compensation to which the plaintiff is entitled is the amount of money or its equivalent paid at the date of cancellation, August 3, 1917, without interest, and that the United States should no more be required by the judgment of the Court of Claims to pay interest on the notes than to pay interest on the amounts of cash agreed to be paid amounting, under the terms of the contract (to and including the installment due June 1, 1917), to the amount found by the Court of Claims as having been paid in cash, namely, $239,500. The plaintiff was required by its contract to make two additional payments of $45,000 each on July 1st and August 1st, 1917, and these payments or their equivalent were (apparently) not made. The total of notes given for the corresponding period was $100,000 (four notes at $25,000 each). In addition a note was apparently given for $80,000 representing part of a cash payment due of $90,000, and the plaintiff, by the judgment of the court below, has recovered interest which it paid on notes which it gave to make good a deficit in the cash payments required to be paid by the contract.

It further appears from the Seventh Finding (p. 14) that on August 27, 1917, plaintiff stated to the Fleet Corporation that the amount paid was the same as that subsequently fixed by the contract of December 8, 1917, between the shipbuilder and the

Fleet Corporation, namely, $419,500 (see Finding XVI, p. 20, Par. X).

Consequently under the findings, the plaintiff, if entitled to recover on the theory of cancellation, should have had judgment for only the amount of cash advanced, without interest, to August 3, 1917, namely, $419,500, plus the $5,500 paid for architects' fees (Finding XVII, p. 21); in all $425,000, less paid on account by Fleet Corporation February 24, 1920, $332,012.87; balance, $92,987.13.

It is settled by the recent decision of this Court that in a cancellation case the plaintiff is not entitled to anticipated profits.

In *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, in which the amount of just compensation to which claimant was entitled under this same statute, with respect to a contract with the United States cancelled by the Secretary of the Navy, was involved, this Court says at page 523:

> It is contended, further, that even if the action of the Secretary of the Navy was warranted by the statute the Car Company was nevertheless entitled to have included as just compensation its anticipated profits.
>
> This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain. In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company

> if it had been fully performed. * * * The contract we must assume was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties. The lower court was right in refusing to allow anticipated profits * * *.

CONCLUSION.

The judgment should be reversed and the claim dismissed unless the Court should hold that plaintiff is entitled on the pleadings and findings to judgment on the theory of cancellation. In that event the cause should be remanded to the Court of Claims with instructions to disallow the interest and the amount allowed for plans and specifications, and to enter judgment for $92,987.13, which sum, together with $332,012.87, the amount paid to the plaintiff before the action was brought, is the amount actually invested by it in the ship which was taken.

JANUARY 7, 1924.

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WM. R. STANS
CL

Supreme Court of the United States

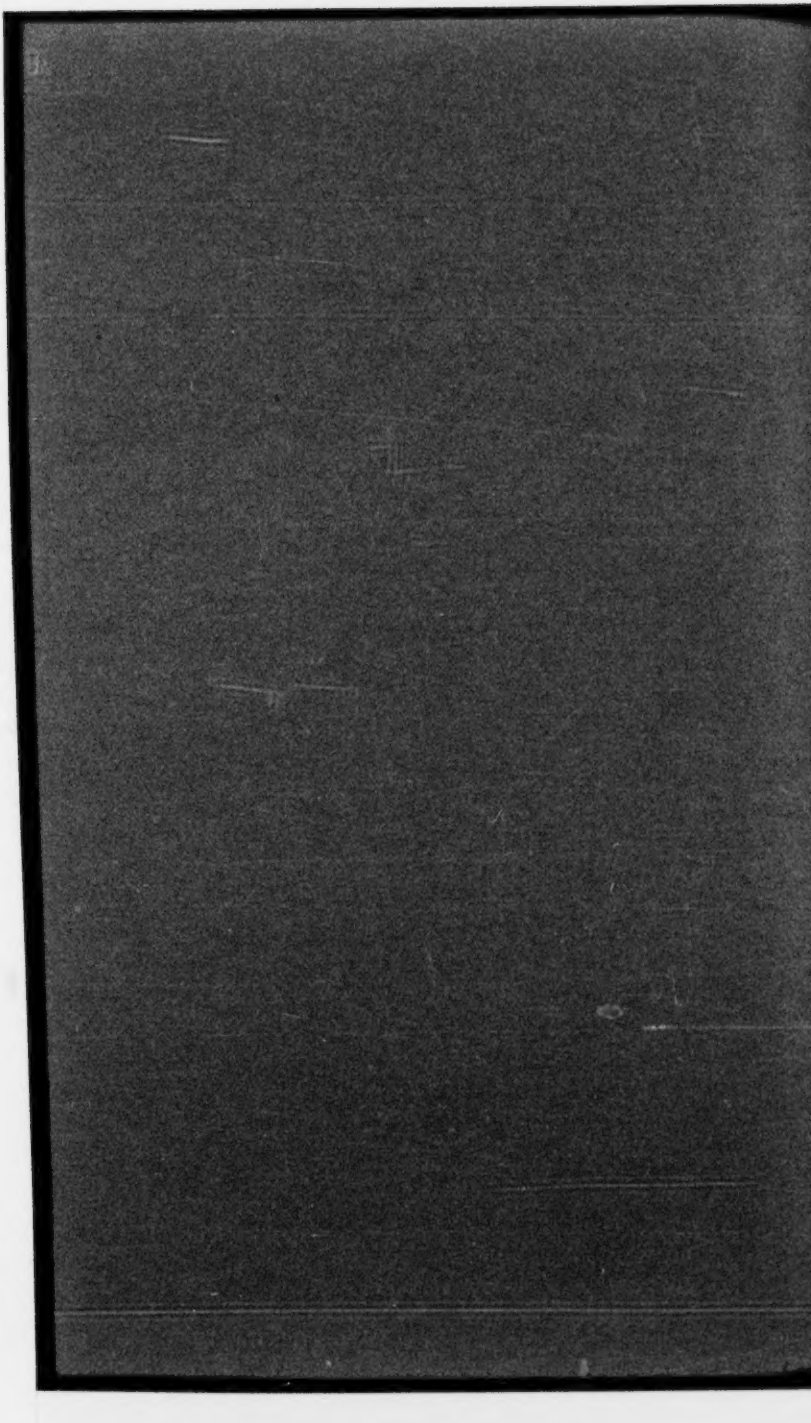
OCTOBER TERM, 1923.

BROOKS-SCANLON CORPORATION,
Appellant,
v.
THE UNITED STATES.
No. 307

THE UNITED STATES,
Appellant,
v.
BROOKS-SCANLON CORPORATION.
No. 385

CROSS-APPEALS FROM THE COURT OF CLAIMS.

BRIEF SUBMITTED BY
CHARLES S. HAIGHT, T. M. CUNNINGHAM, JR., WILLIAM B. KING, JOHN J. FITZGERALD, and WHARTON POOR,
AS *AMICI CURIAE*.



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Supreme Court of the United States,

OCTOBER TERM, 1923.

BROOKS-SCANLON CORPORATION, Appellant, *v.* THE UNITED STATES.	No. 367.
THE UNITED STATES, Appellant, *v.* BROOKS-SCANLON CORPORATION.	No. 385.

BRIEF SUBMITTED BY

CHARLES S. HAIGHT, T. M. CUNNINGHAM, JR., WILLIAM B. KING, JOHN J. FITZGERALD and WHARTON POOR,

AS *AMICI CURIAE* ON BEHALF OF

COMPAGNIE GENERALE TRANSATLANTIQUE, OCEAN STEAMSHIP COMPANY OF SAVANNAH, CONSORZIO VENEZIANO DI ARMAMENTO E NAVIGAZIONE and LUCKENBACH STEAMSHIP CO., INC.

SUPPORTING BROOKS-SCANLON CORPORATION,

Appellant in No. 367 and Appellee in No. 385.

Brooks-Scanlon Corporation will be referred to as claimant and the United States as defendants.

Statement of the Case.

The facts governing the determination of this case are the following:

1. Claimant's predecessor on March 28, 1916, contracted with the New York Shipbuilding Company to build it a vessel according to agreed plans and specifications, the vessel to be delivered February 1, 1918 (Findings I, II, rec. p. 9; contract, rec. p. 33).

2. In August, 1917, the value of a vessel such as that contracted for was substantially twice the contract price (Finding XVIII, rec. p. 21).

3. Long before August 3, 1917, substantially all of the material, equipment and outfit needed to complete the ship had been ordered by the Shipbuilding Corporation (Finding XII, rec. p. 17), and on August 3, 1917, between 35 and 40 per cent of the necessary material, machinery, outfit and equipment had been delivered to the Shipbuilding Corporation, and the ship was about 19 per cent completed (Finding XIII, rec. p. 17).

4. On August 3, 1917, the United States Shipping Board Emergency Fleet Corporation served on the New York Shipbuilding Corporation an order of which the material parts are as follows (Finding V, rec. p. 10):

> "All power-driven cargo-carrying and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.
>
> "On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction and will

prosecute such work with all practical dispatch.

"The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

"You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to the owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts."

On August 18 and 28, the Fleet Corporation served the same order on claimant's predecessors except that its first two paragraphs read as follows (Finding VI, rec. pp. 11, 13):

"all power-driven cargo-carrying, and passenger ships above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

"On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch."

5. The statute authorizing this action was the act of June 15, 1917, Ch. 29 (40 Stat. 182) which, as quoted by the Court below (p. 24), empowered the President:

"(b) To modify, suspend, cancel, or requisition any existing or future contract for the

building, production, or purchase of ships or material.

* * * * * *

"(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof or charter of such ship."

The Act also contained the following provisions:

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor."

* * * * * *

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time."

In the Executive Order of July 11, 1917 (not in this record but printed in the Official Bulletin for July 13, 1917, Vol. I, No. 54, p. 1, and in "Emergency Legislation, passed prior to December, 1917," p. 173, Gov't Pr'tg Office, published under the direction of the Attorney-General) the

President directed that "the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof."

6. On August 22, 1917, a copy of a letter, from the Fleet Corporation to its District Manager was sent by the latter to the New York Shipbuilding Corporation. The material parts of this letter are as follows (Finding VIII, rec. pp. 14-15):

> "Referring to the vessels under construction in the yard of New York Shipbuilding Corporation, Camden, N. J., requisitioned under the corporation's order of August 3d, precedent to the final examination of the contract for the vessels in question, you are requested to inform the shipbuilder as follows:
>
> "The ships now under construction at your plant and referred to above having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States, and an order having been placed with you by due authority to complete the construction of said ships with all practicable dispatch, you are further ordered by the President of the United States, represented by this corporation, to proceed in the work of completion hertofore ordered, in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification, and survey thereof, in-

cluding the meeting of the requirements of the said contract and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

* * * * * *

"For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid: * * * Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order."

On August 28, 1917, the Fleet Corporation addressed a letter to claimant's predecessor of which the material parts are as follows (Finding VI, rec. p. 12):

"The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. * * *

"The corporation will consider payments to the contractor accruing since the date of requisition, upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

"You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. * * *

"It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments hereto-

fore made to the shipbuilder if after investigation of data submitted by you such payments are found in order and in conformity with the contract requirements.

"At your further and early convenience you are requested to submit to the corporation a statement of such indirect expenditures as you have made on account of each vessel; for instance, the cost of superintendence, original design, interest on funds already paid, and the like."

On September 13, 1917, the Shipbuilding Corporation was forbidden by the Emergency Fleet Corporation to accept further payment from "former owners" on account of requisitioned ships and the claimant was forbidden to make further payments (Finding X, rec. p. 16).

7. The vessel was completed and delivered to the United States September 20, 1918, substantially as previously specified. The vessel was constructed out of material, machinery and equipment ordered long before August 3, 1917, and delivered at the prices fixed in such orders. "No further material was purchased subsequent to August 3, 1917, except for the sum of $31,000 for material used for the construction ordered for the military protection of the ship." (See Findings XII, XIII, rec. p. 17.)

8. On December 8, 1917, the New York Shipbuilding Corporation and the Emergency Fleet Corporation entered into an agreement reciting that contracts had been made between the Shipbuilding Corporation and former owners for constructing vessels named; that due to war conditions, these prices had proved to be less than cost; that these ships and all materials for them were requisitioned on August 3, 1917; that the

Shipbuilding Corporation by such requisition was directed "to complete such ships on behalf of the United States." This agreement stipulated payment for all such vessels at cost, plus $10 a deadweight ton profit and indemnified the Shipbuilding Corporation from claims of the former owners (Finding XVI, pp. 18-20). In this contract the Fleet Corporation credited itself with the progress payments previously made by the claimant.

9. By reason of the requisition, claimant lost its contract right to the delivery to it, upon payment of the contract price, of a vessel worth $1,719,400 (Finding XVIII, rec. p. 21).

10. The Fleet Corporation allowed claimant as just compensation $442,683.82 (Finding XVII, rec. p. 21). The Court of Claims allowed claimant the amount of its progress payments, and the value of its plans, specifications and other incidentals, amounting in all to $473,710.58 (Finding XVII, Conclusion of Law, rec. p. 21). No allowance was made by either authority for the requisition of the contract (opinion, pp. 22-28). Campbell, C. J., was of the opinion that such an allowance should have been made (dissenting opinion, pp. 28-30).

On February 24, 1920 payment was made according to statute (act of June 15, 1917, Ch. 29, 40 Stat. 183) of seventy-five per centum of the amount awarded by the Shipping Board (Finding VII, p. 21). Upon suit brought for the excess claimed, the court below having found a larger sum due than that awarded by the Shipping Board, rendered judgment for the difference between that sum and the amount paid (Finding XVII, rec. p. 30). It also awarded judgment for interest on the entire sum found due by it from August 3, 1917, to February 24, 1920, and upon that sum, less the

amount paid on February 24, 1920, to the date of judgment (Conclusion of Law, rec. pp. 21-22).

The question at issue on claimant's appeal is whether, under the Act of June 15th, 1917, or under the Constitution, the government must compensate the claimant for the value of its contract or may appropriate the entire benefit of that contract and merely return to the claimant its progress payments plus the cost of its plans and specifications.

The right to interest is the issue arising upon defendant's appeal.

The Interest of the Amici Curiae in this Appeal.

The Compagnie Generale Transatlantique, the Ocean Steamship Company of Savannah, the Consorzio Veneziano di Armamento e Navigazione, and the Luckenbach Steamship Company, on whose behalf this brief is submitted, are shipowners whose steamers were requisitioned under the same circumstances as was that of the claimant, and whose right to compensation may be governed by the outcome of this appeal.

The only difference between the case at bar and those of the owners above named is that the Brooks-Scanlon Corporation did not, under its contract, become possessed of legal title to the materials in the yard as the instalments were paid whereas, in each of the other contracts it was provided that legal title should pass. It is not believed, however, that this difference entitles the present claimant to a smaller measure of compensation. (See *infra*, p. 40).

The preparation of a somewhat detailed brief has been felt to be justified, not merely on account of the amounts involved, but also because of the

important constitutional question which is raised and because of the fact that an affirmance of the decision of the Court of Claims will be equivalent to a finding that the decision of the Hague Arbitral Tribunal in an arbitration between the Kingdom of Norway and the United States, was totally erroneous (see *infra,* pp. 20-23). We feel sure that this Court would not declare a decision of the Hague Arbitral Tribunal erroneous except after giving the case the most careful consideration.

ARGUMENT.

FIRST POINT.

The Contract was Requisitioned.

Principles Settled by this Court.

Omnia Commercial Co. v. *United States,* 261 U. S. 502, the principal authority relied upon by the government, leads, we believe, directly to the conclusion that the claimant is entitled to compensation for the value of its contract. This court there stated the facts as follows, pp. 507-508:

> "The appellant, on May 19, 1917, by assignment, became the owner of a contract, by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company, of Pittsburgh, at a price under the market. The contract was of great value and if carried out would have produced large profits.
>
> "In October, 1917, before any deliveries had been made, the United States Government requisitioned the Steel Company's en-

tire production of steel plate for the year 1918 and directed that company not to comply with the terms of appellant's contract, declaring that if an attempt was made to do so the entire plant of the Steel Company would be taken over and operated for the public use.

"Appellant brought an action in the Court of Claims alleging in addition to the foregoing, that by the orders of the Government the performance of the contract by the Steel Company had been rendered unlawful and impossible; that the effect was to take for the public use appellant's right of priority to the steel plate expected to be produced by the Steel Company and thereby appropriate for public use appellant's property in the contract."

Two principles are announced by the court, as follows, p. 508:

"The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable.

"But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense."

The latter principle is then illustrated and summarized as follows, p. 508:

"There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property."

The opinion then proceeds as follows, p. 510:

> "The conclusion to be drawn from these and other cases which might be cited is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy."

P. 511:

> "In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended."

After considering a number of cases, the Court says, p. 513:

> "In the present case the effect of the requisition was to bring the contract to an end, and not to keep it alive for the use of the Government.
>
> "The Government took over during the war railroads, steel mills, ship yards, telephones and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things."

The principles thus clearly reasoned have an equally clear application *per contra* in the present case. Under the facts above summarized, to be discussed in detail in the argument, "the effect

of the requisition" was not "to bring the contract to an end," but "to keep it alive for the use of the government." There was "appropriation" of the contract, not "frustration." The principles stated in the *Omnia* opinion lead just as directly to allowance of the claim in this case as they did to its refusal there.

During the war and even after the Armistice, the United States made many regulations which interfered with, and in some cases wholly frustrated, executory contracts between private parties. Exports were embargoed, the output of factories was requisitioned, and individuals and corporations were forbidden to do many things which they otherwise might have done freely. The Government obviously did not become liable, under the provisions of the Fifth Amendment, for the incidental loss arising therefrom.

Appropriation, Not Frustration.

The essential differences between the two cases will now be pointed out.

In the *Omnia* case, this court said, p. 511:

> "In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order."

In the present case the Government recognized its privity with claimant by giving claimant notice of requisition and by paying for what it admittedly took. In the former case there was no requisition; in this case a requisition is admitted and the only question is: What was taken?

The principle laid down in the *Omnia* case, that the mere "frustration" of contracts creates no right to compensation is not questioned, but every case of the destruction or cancellation of a contract is not one of frustration. When there *is* an admitted taking (as here of the unfinished ship), which taking itself destroys a valuable right connected with the thing taken, then full compensation is required and neither the *Omnia* case nor any other decision of this Court holds that the owner of the property so taken is entitled to less than the price at which he could have sold his *entire interest* in the property appropriated or that he must accept less than the damage sustained by him through the taking.

The Requisition Order.

The formal requisition order (rec., pp. 10, 11, 13) declares in its first paragraph that all "ships" of given classification "under construction in your yards" are requisitioned. This is by no means a final declaration that nothing but ships was requisitioned. The scope of the entire instrument is to be determined by examining the whole of it.

In *Omnia Commercial Company,* as quoted above, the test between appropriation or frustration of a contract is whether "the effect of the requisition was to bring the contract to an end" or "to keep it alive for the use of the government." The next paragraph of the order gives the direct response to this test.

> "On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

> "The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned."

All information must be furnished necessary to determine the

> "obligations of the Fleet Corporation in taking over these ships and contracts."

These provisions expressly acknowledge the requisitioning of the contracts as well as of the ships. The order "to complete the construction of said requisitioned ships under construction" asserts the right of the Fleet Corporation as the substituted owner under the requisitioned contracts.

The contracts were kept "alive for the use of the government."

Fleet Corporation to Shipbuilder, August 22, 1917.

The contemporaneous action of the Fleet Corporation confirms this and is wholly inconsistent with the opposite view. The letter of the Fleet Corporation of August 22, 1917 (rec. pp. 14-15) ordered the Shipbuilding Corporation

> "to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contract, plans and specifications, under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification, and survey thereof, including the meeting of the requirements of the said contract and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

> "For the work of completion heretofore and herein ordered the Corporation will pay to you amounts equal to payments set forth in the contract and not yet paid."

The contract contained a guaranty by the shipbuilder against defects developing within three months (rec. p. 36). This is an instance of a provision for the benefit of the owner. Advantage could be taken of that provision only by taking the contract; it must have been lost had the contract not been kept "alive for the use of the Government."

The two paragraphs above quoted cover the whole of the contract obligations; the first calls for the performance, for the Fleet Corporation's benefit, of all provisions made for the owner's benefit in the original contract; the second accepts for the Fleet Corporation the obligations for payment assumed by the owner in the original contract. These provisions together show that the effect of the requisition was not "to bring the contract to an end" but "to keep it alive for the use of the government." The dissenting opinion correctly says (rec. p. 29):

> "Here we find a recognition of the contract and a direction to proceed according to its provisions. * * * These [the vessels under construction] were requisitioned, they were to be completed according to the provisions of the contracts under which they had proceeded to their stage of completion, and payment was to be made upon the basis of the balance due under the contracts."

This letter from the Fleet Corporation to the Builder was part of the original appropriation. It was the immediate definition by the Fleet Corporation of its own order. There could hardly be

a stronger case for the application of the principle stated by this court in *United States* v. *Mason & Hanger Co.* 260 U. S. 323, 325, which applies precisely if we merely change the word "contract" to "requisition":

> "What is the import of this practical interpretation? The Government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer to express and provide for the purpose of the Government in exercise of the duty with which he was charged and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent conduct is necessarily to be considered a definition of them. The officer in a sense is a party to the contract, not only representing but speaking for the impersonality of the Government. Competent, therefore, it would seem, to declare the meaning of the contract."

Fleet Corporation's Attitude to Claimant.

The letter of August 28, 1917, to claimant's predecessor (Finding VI, rec. p. 12) presents the appropriation of the contract from the opposite position. Claimant had made payments to the shipbuilder. Upon requisition, the Fleet Corporation assumed the owner's obligation for future payments, assured claimant of its intention "to reimburse you promptly * * * for the payments heretofore made to the shipbuilder" (rec. p. 12), forbade acceptance of "further payments from former owners on account of requisitioned ships" (September 13, 1917, Finding X, rec. p. 16) and offered as an item of payment to claimant the sums already paid by it (Finding XVII, rec. p. 21). This means that the Emergency Fleet Corporation appropriated to its bene-

fit the payments made by the original owner to the date of requisition, and claimed, as between itself and the shipbuilder, the full benefit of this part performance of the contract previously made by the owner. It took the owner's place under the contract. No such position could have been taken by the Emergency Fleet Corporation unless it had, in fact, requisitioned the contract between the original owner and the shipbuilder.

Complete Assumption of Owner's Place.

By the action above discussed, the Fleet Corporation assumed the position previously occupied by claimant toward the Shipbuilding Corporation and relieved the claimant of the obligations which its previous occupation of that position had involved. It thus completely appropriated the contract.

And the Government *meant* to get the benefit of the contract, as to assembly of material, orderly continuance of procedure, construction already completed, contract price already paid and balance of contract price to be paid. It *intended* to keep the contract alive because what the Governernment wanted was ships and that was the only way to get them promptly.

Difficulty has arisen only because, in settling with owners, the learned counsel for the Fleet Corporation have overlooked one most important detail,—that claimant's rights under the contract were of much more value than the instalments which had been paid to the Builders up to August 3, 1917. "Just compensation" is based on value and not on cost (*United States* v. *New River Collieries Co.*, 262 U. S. 341; *Vogelstein* v. *United States*, 262 U. S. 337).

Contract Between Fleet Corporation and Shipbuilder.

The Fleet Corporation on December 8, 1917, made an agreement for increased compensation with the Shipbuilding Corporation (rec. p. 18). This recites the contract price and says:

> "Due to war conditions, such contract prices have proved and will prove to be less than the actual cost of constructing ships."

This relieved the shipbuilder of all possibility of loss under the requisition.

It was a radical change of position. Under the original proceedings in August, the government secured the benefit of the original contract both as to design and price. The requisition made a change of parties only; this contract, originally between claimant's predecessor and the New York Shipbuilding Corporation, became one between the Emergency Fleet Corporation and the New York Shipbuilding Corporation. The latter parties then negotiated other terms of payment only for their contract. Obviously this could not affect claimant's rights, which had been settled by a transaction months earlier.

But even this agreement (sub-paragraph II, rec. p. 19) shows that the government took the work done up to the date of requisition substantially at the contract price (cost plus $10 a ton), rather than at the greatly enhanced value of August 3, 1917 (Finding VIII, rec. p. 21).

The Fleet Corporation actually received the benefit of all the previous orders for material under the original contract, at the original prices, and the vessel was built of these materials (Findings XII, XIII, p. 17).

Summary.

The conclusion is inevitable that the building contract originally owned by claimant was in fact taken over by the Emergency Fleet Corporation, which subsequently exercised rights which could be claimed only by the owner of the contract.

The above reasoning may be succinctly summarized in the dissenting opinion of the learned Chief Justice of the Court of Claims (rec. p. 30):

> "If the plaintiff had voluntarily assigned its contract with the builder to the Government, and the latter had expressly assumed the unfulfilled obligations and later received the completed vessel, it would not more effectively have acquired plaintiff's contract, its rights, and obligations than actually resulted from what was done in this case. The Government requisitioned the incomplete vessel with the purpose of requiring the completion in accordance with the existing contract; it did require the carrying out of that contract (with slight modification); it took plaintiff's right to have the vessel; it received the vessel and appropriated plaintiff's partial payments thereon to its own use and benefit. The contract was performed; the vessel was delivered. I think the plaintiff's contract was taken and appropriated."

Precedents.

Norwegian Arbitration.

An exact precedent for the present case is found in the adjudication of the Norwegian claims (Sen. Doc. 288, 67th Cong. 4th Sess.). A special tribunal of arbitration was created by the agreement with Norway, signed June 30, 1921 (42 Stat. Part 2, p. 1925), in accordance with the Hague Convention of October 18, 1907 (36 Stat. Part 2, p. 2199),

and the General Arbitration Convention with Norway of April 4, 1908 (35 Stat. Part 2, p. 1994).

The facts there were parallel to those in the present case, as to existing contracts for ship construction, issuance of requisition orders and later construction. The Arbitration Tribunal decided as follows:

P. 11:

> "The order contained in the letter of August 3d expressly requisitioned not only the ships and the material, but also the contracts, the plants, detailed specifications and payments made, and it even commandeered the yards (depriving them of their right to accept any further contracts). In spite of this the United States have contended that there was no requisition except of 'physical property' and have strongly maintained that the word 'contract' in the letter of August 3d only referred to commitments for material. (U. S. case Appendix, p. 212, etc.)"

P. 17:

> "There were several successive changes in the personnel of the leading technical and legal advisers of the Corporation and among the directors themselves, and these changes apparently resulted in a change of policy. * * *
>
> "The Corporation seemed to have forgotten that it had assumed certain contractual obligations, and in particular to have ignored the fact that the retention of the money of the claimants without restoring the ships was obviously unlawful. Such action was not only contrary to international law, but also to the municipal law of the United States. * * *
>
> "The Tribunal is, therefore, of opinion:
>
> "1. That whatever the intentions may have been the United States took, both in fact and in law, the contracts under which the

ships in question were being or were to be completed.

"2. That in fact the claimants were fully and forever deprived of their property, and that this amounts to a requisitioning by the exercise of the power of eminent domain within the meaning of the American Municipal Law."

The weight of authority of international tribunals in like cases in domestic tribunals has not often been discussed. It is obvious that in matters of international scope arising out of conditions of war they should be highly persuasive. It is not a desirable condition that American citizens should receive from their own tribunals, existing under the Constitution and laws of this Government, a smaller measure of recognition of private right than foreign subjects have received under pressure of a decision of a tribunal governed by a neutral umpire.

It is true that in the diplomatic note to the Norwegian Minister forwarding a draft for the amount found due by the Arbitrators, the Secretary of State included a protest against certain features of that award, but that protest was confined to two specific points:

(1) that the award sought to distinguish between the property of neutral aliens and the property of nationals which distinction was considered unsound;

(2) that the award failed to give a satisfactory explanation of the methods of calculation applied or of the reasons for determining upon the amounts awarded in each case (Amer. Journal of International Law, for April, 1923, Vol. 17, p. 287).

No protest whatever was made to the ruling that the building contracts were in fact taken and on this point the award is a precedent of the highest international court in favor of the claimant.

British Rule.

The law in Great Britain is in accord with the decision of the Norwegian arbitration. In *Mersey Docks & Harbour Board* v. *The Lord Commissioners of the Admiralty*, L. R. 1920, 3 K. B. 223, a firm of shipbuilders had agreed on December 4, 1914, to build a barge and to deliver her on or before October 1, 1915, for £22,700. After delays due to war conditions, she would have been completed in April, 1917. The admiralty requisitioned her on February 8, 1917. In February, 1919, the builders offered to duplicate the barge for £63,000, subject to increase or decrease of material and labor which would have resulted in a cost of £70,000. The duplicate could not have been completed before the spring of 1920. The Board, p. 227, claimed the difference between the original contract price and the replacement price. The Admiralty claimed, pp. 228, that the measure of compensation should be the difference between the contract price and the value of the vessel when taken. The Admiralty did not make the contention made here, that the contract was not taken. The sole dispute was as to the measure of the value of the contract thus taken. The Arbitrator submitted the question, p. 229:

> "(i) Whether the Board is entitled to recover the difference between the contract price of barge No. 798 and the cost of replacing her, regard being had to the fact that replacement was impossible at the date of the

act complained of and continued impossible for several years?"

Lord Reading, C. J., said, p. 232:

"The first of these questions is whether the Board is entitled to recover the difference between the contract price of the barge and the cost of replacing her, regard being had to the fact that replacement was impossible, at the date of requisition and continued impossible for several years. The Board seek compensation for the loss of their barge measured and ascertained by the difference between the original contract price and the price they would now have to pay to replace the barge." * * *

P. 233:

"On a broad view of the facts and without undue regard to minute details, the Court has to determine upon what principle the compensation to be awarded to the Board ought to be measured. In my judgment it is sufficient for the purpose of this case to say that the Board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April 1917, replaced by the Admiralty. As it can not be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials which has continued up to the present time. The first question put up by the arbitrator should, I think, be answered in the affirmative. I can see no very material difference between the respective principles contended for by counsel on behalf of the Board and counsel on behalf of the Admiralty. In truth, I think

that both these principles lead to the same conclusion. * * * Whichever course we follow it seems to me that we must arrive at the same result."

It is thus clear that, had the present case arisen in Great Britain, there would have been no question about the award of damages claimed here.

Allanwilde Transportation Corporation v. *Vacuum Oil Co.*, 248 U. S. 377.

In the previous discussion of *Omnia Commerical Co.* v. *United States* (*supra*, p. 10) we have set forth what we believe to be the principles clearly indicated by this court as applicable to a case of actual requisition. The distinction between the *taking* of a contract and its mere frustration is again clearly illustrated in *Allanwilde Transportation Corporation* v. *Vacuum Oil Co.*, 248 U. S. 377. There a voyage of a sailing vessel through the war zone was prevented by an embargo promulgated by the United States. That was a typical case of the frustration of a contract through making its performance illegal. The shipper of the cargo loaded on the *Allanwilde* had paid his freight in advance, just as in the case at bar advance payment had been made under the building contract. But just because the Government, in that case, had taken nothing, it made no demand upon the owner of the vessel to perform the charter and, as a matter of course, it claimed no credit for the prepaid freight. The embargo which merely made performance *impossible* created no relation of any kind between the United States and the parties to the contract. And it must always be true that when a contract between private parties is merely frustrated by governmental action, the government assumes no

rights or obligations under the contract. In such a case the original parties alone are interested and the question of what is to become of previous payments is governed solely by the terms of their agreement. In the case at bar, when the United States credited itself with the advance payments and ordered the completion of the vessel as per specifications and at the contract price, it asserted that the contract was alive and had been assigned (under the statute) to it. That was the only way in which it could become entitled to credit itself with those payments and secure the benefits of the contract.

The Decisions of this Court on the Taking of Contracts.

Even in instances where there is no statutory provision requiring the payment of just compensation when a contract is cancelled, nevertheless it has been held by this Court, and by many other courts, that physical property, the value of which is enhanced by rights based on contract, cannot be taken over under the power of eminent domain without compensating its owner for the value of the contract as well as for the value of the physical property. Indeed, the Constitution requires payment for such contract rights, even though the statute authorizing the payment of compensation, expressly denies it.

In *Monongahela Navigation Company* v. *The United States,* 148 U. S. 312, the United States had taken over, by its power of eminent domain, Lock and Dam No. 7 belonging to the Monongahela Navigation Company.

The Monongahela Company had been incorporated by the State of Pennsylvania in 1836 and

had been granted by a Legislature of that state the right to construct dams and locks upon the River Monongahela. The result of the construction of these dams and locks was to greatly increase the commerce carried upon that river and the tolls received by the company were exceedingly valuable. In passing the statute providing for the condemnation of Lock No. 7, however, Congress expressly provided that in estimating the sum to be paid by the United States "the franchise of said corporation to collect tolls should not be considered or estimated." On the trial of the case, the physical value of the lock and dam was found to be $209,393.52, without taking the franchise into consideration. The company contended that notwithstanding the provision of the Act of Congress, the value of the franchise must be taken into consideration and that the value of Lock No. 7 was $450,000.

It was held by this Court that the company's franchise was its contract with the state, was the property of the corporation, and that the United States *could not legally take over the physical property of the corporation without compensating it for the value of its contract as well as for that of the actual physical property.* This Court said: P. 329:

> "In the case of *Montgomery County* v. *Schuylkill Bridge Co.*, 110 Pa. 54, 58, in which the condemnation of a bridge belonging to the bridge company was sought, the court said: 'The bridge structure, the stone, iron and wood was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the

bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of the franchises. The latter can no more be taken without compensation than can its tangible corporal property. Their value necessarily depends upon their productiveness.' * * *

P. 337:

It would seem strange that, if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice. * * *

P. 343:

It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; *that it only appropriates the tangible property and then either makes the use of it free to all, or exacts such tolls as it sees fit or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it.* The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual

> from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived." (Italics ours.)

In this case the United States was compelled to pay compensation for the franchise, that is, for the contract between the canal company and the State of Pennsylvania, as well as for the actual physical property, even though the statute expressly provided that the franchise should not be taken into consideration in fixing the compensation.

The case holds, directly, that the United States cannot take over property and pay merely the physical value thereof, but must also make compensation for contract rights which are incidental to that property and which make its market value greater than that of the physical property separately considered. The language in the paragraph of the opinion last quoted overrules the very argument made by the government in this case.

It will be argued that the *Monongahela* case cannot be relied on as an authority because, it will be said, that decision rested on estoppel. (See *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 264; *Lewis Bluepoint Oyster Co.* v. *Briggs,* 229 U. S. 82.) The element of estoppel was involved in the *Monongahela* case only to the extent that Congress, having authorized the construction of the dam, was held not entitled to destroy its value, even for the purpose of improving navigation, without making compensation therefor. On

the general principles by which compensation is to be measured, the *Monongahela* case has been cited with approval in the most recent decision of this court on the subject, *United States* v. *New River Collieries,* 262 U. S. 341 at pp. 344 and 345.

Since the decision in the Monongahela case it has been held, repeatedly, that physical property can not be taken by eminent domain without compensating the owner for all franchise or contract rights appurtenant thereto.

In *New York Telephone Co.* v. *State of New York,* 169 App. Div. 310, affd. 218 N. Y. 738 (1915), part of a telephone line owned by the Telephone Company was "taken" by the State for the purpose of constructing a reservoir as a necessary incident to the State barge canal. The State, of course, took the telephone line not for the purpose of operating but to destroy it.

In holding that the Telephone Company was entitled to compensation not only for the loss of its physical property but also for its franchise, the Court said:

P. 318:

> "Not only do the Constitutions of the United States (14th Amendt. Sec. 1) and of the State of New York (Art. 1, Sec. 6) forbid the taking of private property for public use without just compensation, but 'in the case of *Sinnickson* v. *Johnson,* 17 N. J. L. (2 Harr.) 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company,* 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be

said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, Chancellor KENT affirmed substantially the same doctrine.' (*Monongahela Nav. Co.* v. *United States, supra.*)

"It must be held, therefore, that the appropriation by the State was not merely of claimant's franchise rights within the flow line of the reservoir, leaving its structural property practically valueless, but of all its property within such limits, *corporeal and incorporeal, constituting an indissoluble combination of property,* and that the claimant is entitled to be awarded just compensation therefor." (Italics ours.)

In *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, where the City had brought proceedings to condemn the property of the Water Co. and a question was raised as to the effect of these proceedings upon the Water Company's contract with the town of New Lots, this Court, after pointing out that "the contract is a mere incident to the tangible property" (p. 690) continued:

"The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it as they do the tangible property of the company to public uses." (166 U. S. at p. 691.)

See also

Los Angeles v. *Los Angeles Gas Company,* 251 U. S. 32.

Willcox v. *Consolidated Gas Co.,* 212 U. S. 19 at p. 44.

Monongahela Water Co.'s Case, 223 Pa. 323.

Belleville v. *St. Clair County Turnpike Co.,* 234 Ill. 428.

The technical argument made for the Government treats this claim to compensation as if it involved an unwarranted restriction of the Government and an unmerited favor to the individual, but this is far from the truth.

The right to compensation when private property has been taken or destroyed by Governmental action, is not an exception, but the rule. The loss should not be allowed to fall with crushing weight upon some particular individual, but should rather be distributed among all those for whose benefit the sacrifice is made, so that the share of each will be so light as hardly to be noticeable.

And where property has been taken full compensation must be made. In a recent decision this Court said:

> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. He is entitled to the damages inflicted by the taking." (*Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, at p. 304; citations omitted.)

In *Boom Company* v. *Patterson*, 98 U. S. 403, this Court held that the fact that certain islands in the Mississippi River were peculiarly suited for the construction of a boom was one of the matters which must be given effect to when fixing compensation for their taking.

This Court said:

P. 407:

> "In determining the value of land appropriated for public purposes, the same consid-

> erations are to be regarded *as in a sale of property between private parties.* The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. * * *

P. 408:

> As a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." (Italics ours.)

And in the same case this Court approved the statement that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" (98 U. S. at p. 410.)

In *United States* v. *New River Collieries,* 262 U. S. 341, the United States had requisitioned upwards of 60,000 tons of bituminous coal which its owner had shipped, for export, to Hampton Roads, Virginia.

Following the above authorities this Court held that the Collieries Company was entitled to the market value for *export* coal at the time of the taking. The opinion contains a most valuable discussion of the obligations of the United States to compensate the owner of expropriated property, but is, unfortunately, too long to quote *in extenso,* and too closely knit to allow the selection of extracts. It should, however, be noted that this Court said that the owner was entitled to "be put

in as good position pecuniarily as it would have occupied if its property had not been taken" (p. 343); and that, "the owner cannot be required to suffer pecuniary loss" (p. 345). The *Monongahela* case and *Boom Co.* v. *Patterson* are cited with approval and this Court condemns (what the Court of Claims has done in the case at bar) the fixing of compensation at what the property cost the claimant and not at its market value. The decision of the Court of Claims, it should be explained, was handed down before *U. S.* v. *New River Collieries* was decided.

Conclusions Under First Point.

The following conclusions result from the foregoing discussion:

(1) The requisition of August 3, 1917, and other contemporaneous action show the purpose of the Fleet Corporation not to bring this contract to an end but to keep it alive for the use of the government.

(2) The discrimination made in *Omnia Commercial Co.* v. *United States* between frustration and appropriation equally places that case on the side where relief is denied and this on the side where relief is granted.

(3) The relief claimed here was granted in an identical case by an international tribunal of the highest authority and in a closely parallel case by a high British tribunal.

(4) Allowance should be made to claimant for the value of its entire interest in the contract on August 3, 1917, the date of requisition.

SECOND POINT.

If This Contract Was Not Requisitioned, It Was Cancelled and Just Compensation Is Due Therefor.

If it is not clear to the court that this contract was requisitioned, the following is insisted upon as sound:

(a) The President (act of June 15, 1917, *ante*, p. 3) was authorized to modify, suspend or cancel, as well as to requisition, a contract.

(b) If either was done, just compensation was granted by the same statute.

(c) If this contract was not requisitioned, it was cancelled.

(d) Just compensation is due for the loss arising from such cancellation.

The Fleet Corporation definitely forbade the further performance of the contract by ordering the shipyard not to receive, and the claimant not to make, any of the further payments due thereunder. This showed an unmistakable and intentional cancellation of the contract.

While the constitutional provision requires "just compensation" only for property "taken" it is not uncommon that statutory relief is granted for damage which might not amount to a technical "taking." For instance, in *United States* v. *Alexander*, 148 U. S. 186, this court held that the United States was bound to pay for the value of a well which had dried up in consequence of a public work being carried on in the vicinity. The statute in that case provided for compensation to any person who "shall be directly injured in any property right." The statute was held sufficient

to cover Alexander's loss even if the Fifth Amendment did not apply.

The present case is a similar instance. Congress knew that the shipyards of the United States were crowded with ships under construction for domestic and foreign shipowners. The obvious purpose was to give the President a free hand and to allow him in each case to requisition the contract or cancel it or suspend it as he saw fit. But no matter whether the contract was requisitioned and utilized or was merely cancelled, it was provided that the Government "shall make just compensation therefor." The question of payment was not left to discretion. It was peremptorily required.

The definite purpose of Congress to pay the injured party, whether the contract was modified, suspended, cancelled or requisitioned is conclusive in the present case if the Court finds that the claimant's contract was either requisitioned *or* cancelled. Indeed, the mere granting of authority to requisition a contract was recognized in the *Omnia* case as a fact of marked importance. In that case this Court said (p. 514):

> "In Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, *the statute providing for condemnation expressly included contracts* and these were in fact taken and compensation therefor specifically allowed." (Italics ours.)

The taking in that case arose from the fact that the water mains and hydrants were physically taken, and the franchise *thereby* destroyed which, *mutatis mutandis*, is the precise finding contended for by the Government in the case at bar.

THIRD POINT.

Even if allowed nothing for the value of its contract, the claimant is, nevertheless, entitled to an award much greater than that fixed by the Court of Claims.

It is believed that much of the confusion which has been evident in the discussion of this whole question as to the requisition of ships under construction has arisen from a failure to carefully analyze the facts before seeking to apply the law. From the very beginning of the dispute between the owners and the long procession of counsel who have spoken for the Fleet Corporation, it has been insisted that under the President's executive order the building contracts were *not* requisitioned and that *therefore* the Government took only the plates and rivets which happened to be in the yards on August 3d, 1917. That is, however, a complete *non-sequitur*.

Obviously the conclusion contended for could not be true unless the interest of the owners consisted of two elements only, (1) the plates in the yard and (2) the contract rights against the builder. There was, however, a third element which often was of far more value than either of the other two and which may be called, following the phraseology of this Court in other cases, "the going value". That element of value in this and every other requisition case arose from the fact that a vast amount of work had been done *in the actual performance of the contract* which was not represented by the plates and rivets which happened to be in the yard on August 3rd, 1917. As mere raw material these parts were of compara-

tively little value but behind their presence in the yard lay the fact that the plans and specifications had been prepared and engines, boilers and auxiliary machinery had all been designed and ordered months before. A steamer ordered, as this one was, long in advance of the requisition, might be ready for the final assembling, with her engines and boilers actually finished by the sub-contractors and ready to ship, and yet you might not find *at the yard* more than 10% of the total material.

It was this element of "going value", this product of the *performance* of the contract which had taken place *outside* of the builder's yard, which the Government most needed and which it was determined to have on August 3, 1917. They wanted ships which, by virtue of previous contracts, were, in every sense of the word, "ships under construction", as to which each part had been designed, ordered and fashioned to fit into its place for the making of an effective whole. Had the Government destroyed all plans and specifications and mixed up all of the engines, boilers, pumps, winches and the thousand and one parts which go to make up a ship and then drawn up original plans and specifications and started anew, our record for ship construction would have been precisely like our record in the construction of aeroplanes upon which we did start when war was declared. It is common knowledge that not one of those ever flew over the German line in actual conflict.

And this "going value" cannot possibly be confused with the value of the contract. That value which arose from the fact that the contract had already been partly *performed*, was a very real and existing thing on August 3, 1917. It is a matter of common knowledge that vast sums of money

were paid to owners who had placed their building contracts in 1916, not for finished ships but for the mere assignment of their contracts and for the benefit of this "going value" which passed with the assignment. The value of the contract was wholly different from the "going value" and was merely the right of the owner to have the *unfinished work* under the contract completed *at the contract price.*

Let us suppose, as was found in this case, that everything necessary to complete a ship had been ordered months before the requisition, and that nothing remained to be done but assemble the parts. If, under those circumstances, the price of labor had doubled since the contract was signed, the value of the contract would have been the difference between the contract price for assembling and the actual cost of doing that work at the higher labor charge.

In other words the value of the contract related to the work *still to be performed* while the "going value" related to that which had been accomplished, no matter where it had been done. The very fact that, in the case at bar, the builder was willing to complete the ship, *even after requisition,* for the unpaid balance of the contract price (Finding IX, Record, p. 16) shows that, at that time, the cost of labor could not have increased greatly and any increase in the price of materials did not count because all material had been contracted for before August 3d.

It may be argued that the present claimant is not entitled to an award for the value of materials taken and the "going value" of the ship under construction because, as already stated, its contract with the Yard did not contain the usual provision that title to hull and materials should

vest in the claimant as the progress payments were made. But while claimant did not have legal title to Hull 193, it nevertheless was, in equity, to be regarded as the owner thereof; and an award of compensation rests upon equitable principles (*supra*, p. 32). Because a ship is considered by the law a chattel of peculiar value, courts of equity will decree specific performance of contracts relating to ships just as readily as of contracts relating to real estate. *Great Lakes Transportation Co.* v. *Scranton Coal Co.*, 239 Fed. 603, and other decisions referred to in appendix (*infra*, pp. 51-53). It is quite clear that if, in the absence of a requisition, the Shipbuilding Company had attempted to dispose of Hull 193 to some other person, the claimant could have secured equitable relief. In substance, the claimant's interest in the Hull amounted to equitable ownership. This consideration is very important here because, as previously stated, the shipowners, on whose behalf this brief is submitted, were all clothed with legal title to the uncompleted hulls and material assembled in the shipyards.

This element of "going value" has frequently been recognized by this and by other courts as one of the elements which must be considered when fixing the value of property taken under the right of eminent domain.

In *City of Omaha* v. *Omaha Water Company*, 218 U. S., 180, the question before this Court was as to the price which the City of Omaha was to pay for the value of a privately owned system of water works which were being taken over by the City. The appraisers allowed the Water Works the sum of over $550,000 for the separate element of "going value". The City contended that this was erroneous on the ground that under the terms of

the Water Company's charter any value on account of the Water Company's unexpired franchise (or contract) was to be excluded. On this point, this court said (pp. 202, 203):

> "The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. *The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant.* The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company plant, and the commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks* v. *Kansas City,* 62 Fed. Rep. 853, where the opinion was by Mr. Justice Brewer. We can add nothing to the reasoning of the learned Justice, and shall not try to. That case has been approved and followed in *Gloucester Water Co.* v. *Gloucester,* 179 Massachusetts, 365, and *Norwich Gas Co.* v. *City of Norwich,* 76 Connecticut, 565." (Italics ours.)

In *National Water Works* v. *Kansas City,* 62 Fed. 853, which was approved by this Court in the opinion just quoted, the charter of a water company contained the provision that after twenty years the City should purchase the water works, paying for them their "fair and equitable value."

In a proceeding to determine the fair and equitable value, the water company argued that its earnings should be capitalized on a basis of 6%. The contention of the City was, as stated by the court (p. 864):

> "On the other hand, the city insists that the franchise has ceased, and that basing the value upon earnings is in effect valuing a franchise which no longer exists, and which the city is not to pay for; that the true way is to take the value of the pipe, the machinery, and real estate, put together into a waterworks system, as a complete structure, irrespective of any franchise—irrespective of anything which the property earns, or may earn in the future."

Commenting upon whether either of these two theories would result in fixing a "fair and equitable value," the court (by Mr. Justice Brewer) said (p. 865):

> "Capitalization of the earnings will not, because that implies a continuance of earnings, and a continuance of earnings rests upon a franchise to operate the waterworks. The original cost of the construction cannot control, for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A completed system of water works, such as the company has, without a single

connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn." * * *

"The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a water works system without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and going business."

See also *Gloucester Water Supply Co.* v. *Gloucester,* 179 Mass. 365 and *Appleton Water Works* v. *Railroad Commission of Wisconsin,* 154 Wis. 121, Ann. Cases 1915 B. 1160, where it was said:

"The value of the plant and business is inherently indivisible, and this latter value is obtained by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them as inseparable parts of a harmonious entity, and exercising the judgment as to the value of that entity. In this way the 'going value' goes into the final result." (Syllabus by the Court.)

The vice in the position adopted by the counsel for the United States is that they have altogether ignored any element of "going value" and have attempted to base the award to the claimant en-

tirely on the "bare bones" value, contending that *everything else* was "contract value" and that this was frustrated by the requisition.

While the Court of Claims avoided this fallacy, it overlooked the fundamental principles involved. While it found that Hull 193 was worth on Aug. 3, 1917, $1,719,400, less the cost of completion, it did not base its decree on these findings, but, instead, awarded the claimant merely a refund of the progress payments.

FOURTH POINT.

Claimant is entitled to compensation for delay in payment, as a part of just compensation, in the form of interest upon the principal sum found due.

It appears by Finding V (rec. p. 10) that this requisition was issued on August 3, 1917, and that no payment was made until February 24, 1920 (Finding XVII, rec. p. 21). Claimant was without its property or any compensation therefor between those dates. Since the latter date, it has been without its property and has had only partial compensation therefor, less even than the sum allowed by the Court of Claims and very much less than the value of the contract as now claimed.

The Court of Claims (Conclusion of Law, rec. p. 22) allowed interest on the sums unpaid, upon the authority of this Court in *Seaboard Airline Ry.* v. *United States,* 261 U. S. 299.

Defendant asserts error upon the authority of *United States* v. *North American Co.,* 253 U. S. 330, under the provisions of Sec. 177 of the Judi-

cial Code (formerly Rev. Stat., Sec. 1091), declaring:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

In *Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, the property was taken under a war requisition under act of August 10, 1917, Ch. 53, Sec. 10, 40 Stat. 276, allowing proceedings for recovery of just compensation in the United States District Courts. There was no express provision for interest. This court there said (pp. 304-305):

> "The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. * * *
>
> "In support of its contention the Government cites *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. That was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it adopted by the conformity provisions."

The case of *United States* v. *Rogers,* 255 U. S. 163, was then quoted to sustain these principles, as follows, p. 306:

> "Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."

The Court then concluded, p. 306:

> "The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. *The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.* Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. * * *
>
> "The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled" (italics ours).

The same rule was followed in *United States* v. *Benedict,* 261 U. S. 294, 298, affirming 280 Fed. 76. See also *Prince Line* v. *United States,* 283 Fed. 535, 541. The reason was well stated by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Benedict,* 280 Fed. 80, as follows:

"It is certain that the national immunity from payment of interest does not extend to condemnation proceedings. *United States* v. *Rogers*, 257 Fed. 397; *United States* v. *Highsmith*, 257 Fed. 401, affirmed 255 U. S. 170. Since, therefore, just compensation *by definition* includes interest (cf. *Agency, etc., Co.* v. *American, etc., Co.*, 258 Fed. 363, 369) and this statutory method of arriving at compensation is analogous to condemnation proceedings, we are of opinion that the statutory rate prevailing in New York was rightfully allowed. No error is discovered upon the writ of the United States." (Italics ours.)

See also

Appleton Water Works v. *Railroad Comm. of Wisconsin, supra*, p. 43.

In *United States* v. *New York*, 160 U. S. 598, this court affirmed the judgment of the Court of Claims allowing interest as a part of "costs, charges and expenses" reimbursible by statute to a State, p. 621. This court there said, p. 621:

"We can not doubt that the interest paid by the State on its bonds, issued to raise money for the purposes expressed by Congress, constituted a part of the costs, charges, and expenses properly incurred by it for those objects. Such interest, when paid, became a principal sum, as between the State and the United States, that is, became a part of the aggregate sum properly paid by the State for the United States. The principal and interest, so paid, constitutes a debt from the United States to the State. It is as if the United States had itself borrowed the money, through the agency of the State. We therefore hold that the court below did not err in adjudging that the $91,320.84 paid by the State for interest upon its bonds issued in 1861 to defray the expenses to be incurred in

raising troops for the national defence was a principal sum which the United States agreed to pay, and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment thereon."

During the war, many statutes were passed for condemnation of private property beside the act of June 15, 1917, here involved, *ante*, p. 3, and of August 10, 1917, discussed in the *Seaboard* case. Some of these gave jurisdiction to allow "just compensation" to the United States District Courts, others to the Court of Claims, and still others to both courts concurrently, as shown in the footnote.*

It is not conceivable that Congress intended to give interest to the first class and not to the second and to leave it dependent in the last class to the amount involved or to the accident of selection of the tribunal.

**District Courts alone:*

August 10, 1917, Ch. 53, Sec. 10, 40 Stat. 276.

Courts of Claims alone:

October 6, 1917, Ch. 25, 40 Stat. 394.
July 1, 1918, Ch. 114, 40 Stat. 705.

Court of Claims and concurrently in the District Courts to the amount of $10,000, specified by Sec. 24, par. 20, Judicial Code:

March 4, 1917, Ch. 180, 39 Stat. 1193;
June 15, 1917, Ch. 29, 40 Stat. 183;
August 10, 1917, Ch. 53, Sec. 12, 40 Stat. 279;
August 10, 1917, Ch, 53, Sec. 16, 40 Stat. 282;
August 10, 1917, Ch. 53, Sec. 25, 40 Stat. 285;
October 6, 1917, Ch. 79, 40 Stat. 371;
July 1, 1918, Ch. 114, 40 Stat. 720;
July 1, 1918, Ch. 114, 40 Stat. 738.

The jurisdiction of the Court of Claims before these statutes for the recovery of property taken was (as pointed out in the extract from the opinion in *Seaboard Airline Ry.* v. *United States,* quoted *ante,* p. 45) under implied promise and not under condemnation. The grant of jurisdiction by these statutes was of a new character.

"Just compensation," as has been stated again and again, includes the payment of interest, or its equivalent, for delay. Section 177, *supra,* may be reconciled with this by holding that proceedings to recover "just compensation" are contractual in nature and that the use of a term which "by definition," includes interest is equivalent to an express stipulation therefor. But if Section 177 is in conflict with the later acts they repeal that section so far as suits brought under those acts are concerned. In other words the case at bar is brought under a statute the terms of which require payment of interest, or its equivalent, under the present circumstances. General statutory provisions which are at variance with the Act under which suit is brought must, of course, yield to that Act.

Furthermore, since "just compensation," including interest, is a constitutional right, the statute must be so construed as to allow interest, if its validity is to be upheld. The statute is not to be interpreted, by construing it with another statute, as unconstitutional, if, when read alone, it is constitutional.

Conclusion.

For the foregoing reasons, it is submitted that in No. 367 the judgment below should be reversed and the Court directed to enter judgment for the value of the contract on August 3, 1917, and in No. 385 the judgment allowing interest as a measure of just compensation should be sustained.

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APPENDIX.

The appellant was in equity the owner of Hull 193.

The fact that the appellant was in equity owner of the hull is made clear by the fact that a court of equity would have restrained the shipbuilder if it had attempted to sell or otherwise dispose of the hull; and such a court might have required the shipbuilder to perform its contract (assuming, of course, that there had been no requisition by the United States.)

In *Great Lakes Transportation Co.* v. *Scranton Coal Co.*, 239 Fed. 603 (C. C. A. 7th Circuit, 1917), the Transportation Company had agreed to employ nine steamers owned by it in the carriage of coal for the Coal Company for the season of navigation on the Great Lakes, for the years 1916, 1917, and 1918. During the period of performance of the contract, the Transportation Company sold the boats to its vice-president and director, and it was threatened that the contract would not be carried out, but that the boats would be employed in carrying cargoes to Europe which was more remunerative at that time. It was held that the Coal Company had such an interest in the steamers that a decree of specific performance would be granted, even though the rights of a purchaser were involved. The Court said:

> "If specific performance be otherwise proper, equity is no longer deterred from granting its aid because of a so-called lack of mutuality in the remedy. It suffices that defendant's compulsory performance is conditioned upon plaintiff's continued readiness to carry out his obligation. Montgomery Traction Co. *v.* Montgomery Light & Water Co., 229 Fed. 672,

144 C. C. A. 82; Ames Lectures on Legal History, p. 376. See, too, Guffey *v.* Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856.

That Pratt had purchased the boats, and contracted to re-sell them just before this suit was brought, will not defeat plaintiff. Pratt had been the Transportation Company's vice-president and director; at the time of the alleged purchase, he was its principal stockholder; he had full knowledge of the contract, and of plaintiff's claim. He can be fully protected as against the company or any other stockholders for the money paid by him to secure the discharge of the mortgage on the boats or given to the company on account of the purchase price. His knowledge of the entire situation subordinates him as owner to plaintiff's *prior equitable right* to specific performance." (239 Fed. at p. 609.)

While a ship is personalty, nevertheless it is considered as a chattel of peculiar value, and a Court of Equity will grant specific performance of a contract for the sale of a ship—from which follows the corollary that the purchase becomes invested with the equitable title from the moment the contract becomes binding, just as in the parallel case of a purchase of real estate.

In *Menier* v. *Donald,* 165 N. Y. Supp., 50, 98 Misc. 684 (February, 1917), it was held that a Court of Equity would compel the specific performance of a contract for the purchase of a steamer, the Court saying:

"There is authority, both in this country and in England, for the proposition that a ship is a special kind of personal property, which in itself may justify a court of equity in decreeing specific performance. *Lynn* v. *Chaters,* 2 Keen. 521; *Claringbould* v. *Curtis,* 21 L. J. Ch. (N. S.) 541; *Hart* v. *Herwig,* L. R. (8 Ch. Div. 860; *Hurd* v. *Groch,* 51 Atl. Rep. 278 (N. J.); *Clark* v. *Flint,* 39 Mass. 231; 36

> Cyc. 558. But even if this were not so, I think the allegations of the complaint as to the special and peculiar value of this ship to the plaintiff and the difficulty of replacing it or determining its value and his damages under present (war) conditions are amply sufficient to sustain the complaint against demurrer."

And the rule is well settled that even a charter-party,—that is, a mere hiring—will always be specifically enforced at least to the extent that the charterer may have a decree forbidding the owner to employ the vessel in a way inconsistent with the charter.

In *De Mattos* v. *Gibson,* 4 De Gex and Jones, 276 (1859), Lord Chelmsford said:

> "A person who hires a vessel under a charterparty does so not merely from a wish to have his goods conveyed to a particular place, but upon a careful choice of the vessel itself as best adapted for his purposes. * * * I think that a vessel engaged under a charterparty ought to be regarded as a chattel of a *peculiar value* to the charterer, and that although a court of equity cannot compel a specific performance of the contract which it contains, yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden, according to the principle so fully expressed in the case of *Lumley* v. *Wagner.*" (4 De Gex & Jones, 276, p. 298.)

To the same effect are *Sevin* v. *Deslandes,* 30 L. J., N. S., Ch. 457; *Messageries Imperiales* v. *Baines,* 7 L. T. N. S., 763; *Collins* v *Lamport,* 34 L. J. Ch. 196; Carver on Carriage by Sea, 6th Ed., sec. 39, page 54; Maclachlan on Merchant Shipping, 5th Ed., page 404; also the recent decision in the Court of Appeal in *Furness, Withy & Co.* v. *Larsen,* Vol. 2, Lloyd's List Law Rep. 557 (March, 1920).

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CLERK

No. 385. October Term, 1923.

IN THE

Supreme Court of the United States.

THE UNITED STATES,
Appellant,

v.

BROOKS-SCANLON CORPORATION.

Brief in Favor of Allowance of Interest as a Part of Just Compensation in Commandeering Cases.

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IN THE

Supreme Court of the United States.

October Term, 1923. No. 385.

THE UNITED STATES,
Appellant,

v.

BROOKS-SCANLON CORPORATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN FAVOR OF ALLOWANCE OF INTEREST AS A PART OF JUST COMPENSATION IN COMMANDEERING CASES.

STATEMENT OF QUESTION INVOLVED.

Does Section 177 of the Judicial Code forbidding the payment of "interest" in cases in the Court of Claims until after judgment is rendered, prevent the awarding, in commandeering cases, of a sum, measured by the legal rate of interest, as part of the just compensation to which the citizen is entitled under the Fifth Amendment?

ARGUMENT.

We contend:

I. THE CLAIM IS "FOUNDED UPON THE CONSTITUTION OF THE UNITED STATES" AND A "LAW OF CONGRESS", (Judicial Code, Section 145), SUCH "LAW OF CONGRESS" BEING THE ACT OF JUNE 15, 1917, AND HENCE SECTION 177 OF THE JUDICIAL CODE IS INAPPLICABLE.

II. IN COMMANDEERING CASES JUST COMPENSATION REQUIRES THAT THE CITIZEN BE MADE WHOLE AS OF THE DATE OF THE TAKING.

III. WHEN PAYMENT IS DELAYED THE CITIZEN CAN BE GIVEN JUST COMPENSATION IN NO OTHER WAY THAN BY AN ALLOWANCE FOR THE DELAY IN PAYMENT.

IV. INTEREST IN JUST COMPENSATION CASES IS ALLOWED, NOT AS INTEREST, BUT AS "DAMAGES FOR DETENTION" IN ORDER THAT THE CITIZEN MAY BE GIVEN THE FULL EQUIVALENT OF THE PROPERTY COMMANDEERED AS OF THE DATE OF ITS REQUISITION.

V. THE RIGHT TO JUST COMPENSATION BEING FIXED BY THE CONSTITUTION, IT CANNOT BE LIMITED, QUALIFIED, OR TAKEN AWAY BY CONGRESS.

VI. ACTS OF CONGRESS MUST BE SO CONSTRUED, IF POSSIBLE, AS NOT TO CONFLICT WITH THE CONSTITUTION.

VII. SINCE AN EFFORT TO DENY OR LIMIT THE RIGHT TO FULL JUST COMPENSATION, INCLUDING DAMAGES FOR DETENTION, WOULD BE BEYOND THE POWER OF CONGRESS, IT WOULD BE PRESUMED THAT CONGRESS HAD NO SUCH INTENT.

VIII. IN FORBIDDING THE PAYMENT OF INTEREST IN CASES IN THE COURT OF CLAIMS UNTIL AFTER JUDGMENT IS RECOVERED, CONGRESS MUST HAVE HAD IN MIND CONTRACT CASES AND NOT EMINENT DOMAIN OR COMMANDEERING, SINCE, IN THE LATTER, INTEREST IS NOT ALLOWED AS INTEREST AND SINCE IT WOULD BE BEYOND THE POWER OF CONGRESS TO LIMIT A CONSTITUTIONAL RIGHT.

I. The Claim is "Founded Upon the Constitution of the United States" and a "Law of Congress" (Judicial Code, Section 145), Such "Law of Congress" Being the Act of June 15, 1917, and Hence Section 177 of the Judicial Code is Inapplicable.

Section 145 of the Judicial Code reads as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) First. All claims (except for pensions) *founded upon the Constitution of the United States or any law of Congress* . . . "

The Act of June 15, 1917, provides as follows:

> " . . . it shall make just compensation therefor to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid 75% . . . *and shall be entitled to sue the United States to recover* such further sum as . . . will make up . . . *just compensation* . . . in the manner provided for by Section 24, paragraph 30, and Section 145 of the Judicial Code."

The case is therefore wholly unlike

> United States v. North American, etc., Co., 253 U. S. 330 (1919),

which was based on an implied promise of the United States to pay for property appropriated by it.

This distinction was pointed out in

> Seaboard Air Line v. U. S., 261 U. S. 299 (1923),

an action under the Lever Act (40 Statutes-at-large, 276), which, (Section 10) authorized the claimant

> "to sue the United States to recover such further sum as . . . will make up . . . just compensation . . . "

Mr. Justice Butler said:

> "*The owner's right does not depend on contract, express or implied. A promise to pay is not necessary.* None is alleged. *This suit is part of the authorized procedure initiated by the United States* for the condemnation of the land. *The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. . . . The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation.*"

Of the North American Transportation & Trading Co. case, *supra*, it was said:

> "That was a suit in the Court of Claims, *based on an implied promise* of the United States to pay for property appropriated by it. . . . "

Since the claim in the case at bar is not based upon an implied promise but is founded upon the Constitution of the United States and a law of Congress in pursuance thereof, the North American case is inapplicable and the claimant is entitled to the full measure of just compensation guaranteed by the Constitution.

The following jurisprudence has been definitely established:

(a) The citizen is entitled to be made whole for goods commandeered.

(b) The just compensation guaranteed by the Constitution must be paid as of the date of the taking.

(c) Hence, the damages for detention (or interest) must be included in the award.

(d) Any other decision would have been contrary to common honesty. Market price, being the measure of just compensation:

> United States v. New River Collieries Co., 262 U. S. 341 (1923);

the citizen could have obtained cash in the market. The use of money has a well-known value. By the act of commandeering the citizen is deprived of the use of his money. Unless he is compensated therefor he does not receive the true measure of compensation to which he is entitled under the Constitution.

(e) In eminent domain cases, in which the Government is obliged to bring legal proceedings in order to obtain title, the right to interest is clear and undoubted.

> United States v. Rogers, 225 U. S. 163 (1921);
>
> Seaboard Air Line Railway Co. v. U. S., 261 U. S. 299 (1923);
>
> Brown v. U. S., Adv. Ops. 1923-1924, p. 104, decided November 12, 1923.

Yet in such cases there is merely the fiction of an immediate market value, ascertained by expert testi-

mony, as aginst the *fact* of actual market value in cases of commandeering of personal property. The reason for the rule exists *a fortiori* in the case of goods readily salable in an open market.

With the greatest respect, it is submitted that the distinction in

> United States v. North American, etc. Company, 253 U. S. 330 (1919),

as between eminent domain cases and commandeering cases, ignores the question of constitutional law involved and emphasizes *procedure* as against *substance*.

In eminent domain, as in commandeering, the substance of the right arises out of the Fifth Amendment. Government has no power to take except upon payment of just compensation. Government is under a duty to pay just compensation in full. Government has no right to pay less than just compensation:

> Monongahela Navigation Co. v. U. S., 148 U. S. 312 (1893).

The mandate is laid upon every department of the Government. The case is one of the rare ones in which it can be demonstrated mathematically that only one decision is possible without violating a plain constitutional right.

That plain constitutional right is to be paid in full *as of the date of the taking*. Any conclusion by which the citizen is forced to give up his property for public use and is obliged to receive less than just compensation involves a palpable violation of his constitutional right.

To say that the citizen whose real estate is taken must be made whole as of the date of the taking, but that the citizen whose goods are taken need not be, would be to make a laughing stock of the Constitution.

To say that the citizen whose goods are taken and to whom Congress gives the right to sue in the District Court is entitled to be made whole as of the date of the taking, and that the citizen who must sue in the Court of Claims cannot be made whole as of the date of the taking, would be to make the law ridiculous.

No citizen whose property is taken under such circumstances will ever be able to understand how Congress can defeat his constitutional right by giving jurisdiction to the Court of Claims rather than to the District Court.

The citizen will always regard and will rightly regard *his right in such cases as being based on the bed-rock of the Constitution.* He will believe that the Constitution should operate in an equal way in respect of real as well as personal property, and should apply to proceedings in the Court of Claims as well as in other courts.

If Congress had attempted by plain words to enact that the Court of Claims should have jurisdiction in commandeering cases and that the recovery should be ninety per cent. of the market value, this court would sustain the general jurisdiction of the Court of Claims and would strike down the unconstitutional proviso.

If Congress, by the express terms of an act, had conferred jurisdiction on the Court of Claims in commandeering cases and had added the proviso "provided that in such cases no allowance for damages for detention, or interest, shall be made until after the rendition of judgment," this court, comparing the Constitution with the proviso, would sustain the Constitution as against the portion of the act repugnant to the Constitution.

In essence the case at bar is precisely the same, so far as concerns the conclusion reached. In the instances given, the Court would be required to strike down portions of an act plainly repugnant to the Constitution. In the case at bar the Government is asking this court to assume that Congress intended by indirection and by inference to override the Constitution.

There is no real evidence that Congress so intended. The words of Section 177 of the Judicial Code have a proper legal meaning limited to interest *qua* interest. Damages for detention may be measured by interest, but such damages are, in fact, not the same as interest.

> U. S. v. Rogers, 255 U. S. 163, 169 (1921);
> Seaboard Air Line Railway Co. v. U. S., 261 U. S. 299, 306 (1923).

We respectfully submit that the decision in United States v. North American Company is made to turn upon a plain error, which may be said to be an error of fact; namely, that the right of action is not upon the Fifth Amendment. We submit, as a matter of fact, that the right of action *is* upon the Fifth Amendment. The fact is that no contractual relation exists between the Government and the citizen when the Government says, "Willy nilly, you must hand over your property for Government use."

It is a fiction to say that there is an implied contract to pay. And a fiction should never be permitted to work injustice:

> 25 C. J. 1086;
> U. S. v. 1960 Bags of Coffee, 8 Cranch. (U. S.) 398, 415,

much less override the Constitution. The fact is, not an implied contract, but an express obligation imposed

by the supreme law. Any construction of the existing acts of Congress which would fail to find therein ample authority in an existing court to make awards in accordance with the obligation imposed by the supreme law, would imply that Congress has been derelict in its duty for nearly a century and a half.

The manner in which and the court in which the citizen's right to enforce the Government's obligation to pay just compensation may be asserted, are matters *purely procedural*. It borders on the fantastic to suggest that a question of procedure as to whether one court of the United States or another court of the United States has jurisdiction can affect the substance of a right guaranteed by the Constitution. *In one court of the United States the citizen is entitled to the full measure of compensation guaranteed by the Constitution. In another court of the United States he is not entitled to receive the full measure of such just compensation!* And the Government seeks to reach this amazing conclusion under general phraseology which the Court of Claims has rightly held was not intended by Congress to deprive that court of power to render the same measure of equal and exact justice to which citizens are entitled in other courts of the United States.

II. In Commandeering Cases Just Compensation Requires That the Citizen Be Made Whole as of the Date of the Taking.

In the language of Mr. Justice Brewer, in Monongahela Navigation Co. v. U. S., 148 U. S. 312 (1892), when the Federal Government condemns private property for a public purpose, the compensation to the owner "*must be a full and perfect equivalent for the property taken.*"

See also:

Seaboard Air Line Railway Co. v. U. S., 261 U. S. 299 (1923);

U. S. v. New River Collieries Company, 262 U. S. 341 (1923).

III. When Payment Is Delayed the Citizen Can Be Given Just Compensation In No Other Way Than by an Allowance for the Delay in Payment.

How else can the owner be put "*in as good condition pecuniarily as he would have been if the property had not been taken*" (U. S. v. Town of Nahant, 153 Fed. 520 (1907), if he is not awarded damages for delay in paying to him the just compensation to which he is entitled?

In U. S. v. First National Bank, 250 Fed. 299 (1918), in his instructions to the commissioners appointed to assess damages sustained by the owners of land taken by the United States for a military camp, Clayton, District Judge, said, page 301:

> "The sole question for you to determine, in each one of the cases, is the value of the lands and the property at the time of the actual taking and occupation by the United States, *together with interest at the rate of 8 per centum per annum, the legal rate in Alabama, on said sums so ascertained by you, from the date of such actual taking and occupation.*"

IV. Interest In Just Compensation Cases Is Allowed, Not as Interest, But as "Damages for Detention" In Order That the Citizen May Be Given the Full Equivalent of the Property Commandeered as of the Date of the Requisition.

It must be constantly borne in mind that this is not an attempt to recover "interest" from the United States. It may be conceded as a general proposition that "interest" is not recoverable against the United States on unpaid "accounts" or "claims," such as are found to be due to individuals upon the settlement of accounts with its officers and agents.

But even in those cases wherein "interest" on claims against the United States was not allowed, a right to recover "damages," which may be measured by the legal rate, is recognized.

In the case at bar, damages measured by the legal rate of interest are guaranteed to this claimant by the provision of a higher authority than that of an act of Congress, to wit, the Constitution of the United States, in the Fifth Amendment. As has been illustrated, *supra,* the "just compensation therein provided for has been judicially determined to be that which would place the property owner in as good position pecuniarily as he would have been if his property had not been taken."

See:

Shoemaker v. U. S., 147 U. S. 282, 320 (1893);

U. S. v. Rogers, 257 Fed. 397 (1919);

Seaboard Air Line Railway Co. v. U. S., 261 U. S. 299 (1923).

The decision in U. S. v. Rogers was affirmed by the United States Supreme Court in 255 U. S. 163, where Mr. Justice Day, speaking for this Court, said, page 169:

"Having taken the lands of the defendants-in-error, it was the duty of the Government, to make

just compensation as of the time when the owners were deprived of their property, Monongahela Navigation Company v. United States, 148 U. S. 312, 341.

. . . . . .

". . . We agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled."

In the case of Seaboard Air Line v. U. S., *supra*, this Court said, at page 306, per Butler, *J.*:

> "The rule above referred to, that in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. *The requirement that 'just compensation' shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.* Where the United States condemns and takes possession of land before ascertaining or paying compensation the owner is not limited to the value of the property at the time of the taking; *he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.*"

In like manner the claim in the case at bar is for damages arising from the failure to pay claimant just compensation for its property *on the dates of the actual taking thereof from its possession by the United States.* At those respective times *claimant should have been paid just compensation,* and the inconveniences to which it has been subjected by the delay must be considered and allowed for, at the rate of 6 per centum per annum on the market value of its property at those dates.

V. The Right to Just Compensation Being Fixed by the Constitution, Cannot Be Limited, Qualified, or Taken Away by Congress.

As was said by Mr. Justice Butler, in the case of Seaboard Air Line Railway Company v. United States, *supra:*

> "Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. *Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute.*"

VI. Acts of Congress Must Be So Construed, If Possible, as Not to Conflict with the Constitution.

It is, of course, hornbook law that a statute, when reasonably possible, must be so construed as to uphold its validity.

> "Indeed, a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score . . . If a statute is susceptible of two constructions, one of which will render it constitutional, and the other unconstitutional, it is the duty of the Court to adopt that construction which, without doing violence to the fair meaning of the language, will render it valid."

12 C. J., pp. 787-788;

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531 (1914);

United States v. Delaware & Hudson Co., 231 U. S. 366 (1909).

VII. Since an Effort to Deny or Limit the Right to Full Just Compensation, Including Damages for Detention, Would Be Beyond the Power of Congress, It Would Be Presumed That Congress Had No Such Intent.

In Pennsylvania Coal Co. v. United States, *supra*, after stating the rule quoted above, the Court, per Pitney, *J.*, went on to say, at page 546:

> ". . . there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority."

VIII. In Forbidding the Payment of Interest in Cases in the Court of Claims Until After Judgment is Recovered, Congress Must Have Had in Mind Contract Cases and Not Eminent Domain or Commandeering, Since in the Latter Interest is not Allowed as Interest, and Since It Would Be Beyond the Power of Congress to Limit a Constitutional Right.

It is true that Section 177 of the Judicial Code provides as follows:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

But, as we have already seen, interest in just compensation cases is allowed, not as interest, but as part of the just compensation to which the owner is entitled under the Constitution. As was said in the concluding remarks of the Court in the case of Seaboard Air Line v. United States, at page 306:

> "The addition of interest . . . is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

The prohibition of the Judicial Code cannot apply, then, to a case of eminent domain or commandeering.

In the case of United States v. New York, 160 U. S. 598, 622 (1895), it was held that the collection of an amount, measured by interest, is not prohibited by the statute limiting the powers of the Court of Claims or by the common law rule which exempts the sovereign from liability to pay interest.

An intent by Congress to deprive the citizen in eminent domain and commandeering cases of his constitutional right to just compensation, by forbidding the award of interest cannot be presumed, since to do so would render the statute unconstitutional and void.

The Court of Claims was clearly right in ignoring the inapplicable provisions of section 177, and in deciding that interest must necessarily be allowed as an integral part of the just compensation guaranteed by the Fifth Amendment.

IRA JEWELL WILLIAMS,
Amicus Curiæ.

CARLOS BERGUIDO, JR.,
JOHN H. STONE,
F. R. FORAKER,
FRANCIS SHUNK BROWN,
Of Counsel.

BROOKS-SCANLON CORPORATION *v.* UNITED STATES.

UNITED STATES *v.* BROOKS-SCANLON CORPORATION.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 367, 385. Argued January 8, 1924.—Decided May 12, 1924.

1. Orders of the Emergency Fleet Corporation directed to a shipbuilder expropriated a vessel in process of construction under a contract between the builder and the plaintiff, together with the materials purchased by the builder for its completion, the benefits and advantages of payments made, and of plans, specifications and prior inspection service provided, by the plaintiff, and placed the Fleet Corporation in the plaintiff's shoes with respect to the past and future execution of the contract by the builder. The United States thus obtained the ship early and the benefit of prices much lower than those prevailing at time of requisition. *Held:*

(a) That the plaintiff's rights under the contract with the builder were taken. P. 119.

(b) That the just compensation to which the plaintiff was entitled did not depend upon the title to the materials used in the construction, and was not to be gauged by the progress payments made, or by the compensation payable if the Government had merely canceled the contract; but was to be measured by the value of the plaintiff's rights under the contract at the time of the taking. P. 121.

(c) Just compensation is the sum which, considering all the circumstances, uncertainties of the war, etc., probably could have been obtained for an assignment of the plaintiff's rights under the contract, i. e., the sum that would in all probability result from fair negotiations between an owner willing to sell and a purchaser desirous of buying. P. 123.

(d) The value of such ships at the time of requisition, the then probable value at the time fixed for delivery, the contract price, payments made and to be made, the time to elapse before completion and delivery, the possibility that, by reason of the Government's activity in controlling materials, the contractor might not have been able to complete the ship on time, loss of the use of money to be sustained, other expenditures to be made between requisition and delivery,—all should be given consideration in determining the plaintiff's loss caused by the taking. P. 125.

2. Replacement cost not necessarily the sole measure of or guide to value in ascertaining just compensation. *Id.*

58 Ct. Clms. 274, reversed.

APPEAL and cross appeal from a judgment of the Court of Claims in an action to recover a balance alleged to be due as just compensation for the taking by the Shipping Board of the plaintiff's rights under a contract for the construction of a ship.

Mr. John Junell, with whom *Mr. William A. Lancaster*, *Mr. David F. Simpson* and *Mr. Edward P. Sanborn* were on the brief, for Brooks-Scanlon Corporation.

Plaintiff's contract was property within the protection of the Fifth Amendment. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390; *West River Bridge Co.* v. *Dix*, 6 How. 507; *Chicago, B. & Q. Ry. Co.* v. *Drainage Commrs.*, 200 U. S. 561.

The President was authorized to requisition it.

The contract was taken. The defendant made itself the successor of the plaintiff under the contract—the owner of plaintiff's rights. It could have become such owner in no way other than by the condemnation and taking of the contract.

When the defendant displaced the plaintiff under the contract and took that place itself, and exercised all the rights the plaintiff had under it, and agreed to pay to the builder, and did pay, the balance of the installments

of the contract price, it took over and appropriated the contract and all the rights and interests the plaintiff had in it.

The defendant could not take the uncompleted ship, as it did do, and order the builder to complete the construction in accordance with the contract, plans and specifications, pay the builder the balance of the contract price, appropriate the amount which had been paid by the plaintiff, and receive from the builder the ship completed in accordance with the contract with no change whatever except a slight change for the military protection of the vessel, without taking the contract within the meaning of the Fifth Amendment.

The defendant took and used the plaintiff's plans and specifications, its service of inspection and classification of the vessel, its insurance while under construction, the guaranty of materials and labor, the vessel when completed, the payments made by the plaintiff to the builder, all of which were valuable rights of the plaintiff under the contract; and there was no provision of the Act of June 15, 1917, under which these rights could have been taken without taking the contract itself. They were essential parts of the contract and could not have been separated from it.

Although under the contract the legal title to the ship during its construction was in the Shipbuilding Corporation, the plaintiff then had such substantial rights and equities in the uncompleted ship as the courts recognize and protect.

The parties to the contract evidently understood this, for they provided in it that the builder should keep the vessel insured at all times during the construction in an amount at least equal to payments made by the plaintiff, with loss if any payable as their interests might appear.

A ship is personal property of such peculiar character that both in England and in this country an action for

specific performance of contracts relating to it will lie. *Lynn* v. *Chaters,* 2 Keen, 521; *Claringbold* v. *Curtis,* 21 L. J. Ch. N. S. 541; *Duff* v. *Fisher,* 15 Cal. 381; *Peer* v. *Kean,* 14 Mich. 354; *Menier* v. *Donald,* 165 N. Y. S. 50; *Great Lakes Transp. Co.* v. *Scranton Coal Co.,* 239 Fed. 603.

The contract and the rights of the plaintiff thereunder were so connected with and involved in the ship itself, that the requisition of the vessel under construction was a taking and appropriation of the contract, and all plaintiff's rights under it, including its equitable rights and interests.

This is true whether the United States made use of the contract thereafter or made it valueless to the plaintiff. *United States* v. *Lynah,* 188 U. S. 445; *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *Chappell* v. *United States,* 34 Fed. 673; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312.

It was conceded by the defendant and found by the Court of Claims that the Government did requisition the ship under construction. It requisitioned then the plaintiff's equitable rights and interests in the ship springing out of the contract in any event. And if, by taking the ship, it rendered the contract and the obligation of the Shipbuilding Corporation under it valueless to the plaintiff, it thereby appropriated the contract, whether it used the contract thereafter or not.

Omnia Commercial Co. v. *United States,* 261 U. S. 502, does not rule the case at bar.

In that case no specific steel plate had been appropriated to the plaintiff's contract, and no part of the purchase price had been paid. The Omnia Company had no equitable title or interest in the steel plate, and specific performance of its contract could not be enforced.

There the United States dealt only with the Steel Company. Here it dealt with both parties to the contract.

There the United States did not step into the shoes of the plaintiff under the contract and use it; the contract was made simply unenforceable as between the Omnia Company and the Steel Company. Here the contract was kept alive for the use of the Government and used.

There the damages resulting to the Omnia Company were merely consequential. Here the loss to the plaintiff was the natural, direct and inevitable result of what the defendant did.

There the contract was destroyed under the police power of the United States. Here the contract was taken under the right of eminent domain.

This suit is a part of the authorized procedure initiated by the United States for the condemnation of the ship and all the rights and interests of the plaintiff under the contract. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299.

The value to the plaintiff of the contract, and its rights and interest in the ship under the contract, was the difference between the value of the ship when requisitioned and the amount which the plaintiff was then required under the contract to pay in order to get it.

Just compensation is the value to the owner at the time of the taking of the property taken. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299; *United States* v. *Rogers*, 257 Fed. 397; *Sanitary District of Chicago* v. *Pittsburgh Ry. Co.*, 216 Ill. 574; *United States* v. *New River Collieries Co.*, 262 U. S. 341.

The plaintiff is entitled to interest as a part of its just compensation upon the value of the property taken from the date of the requisition. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299; *United States* v. *Benedict*, 261 U. S. 294; *Prince Line* v. *United States*, 283 Fed. 535; *United States* v. *Rogers*, 255 U. S. 163.

Mr. Henry M. Ward, with whom *Mr. Solicitor General Beck*, *Mr. Chauncey G. Parker* and *Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, were on the brief, for the United States.

The findings of fact clearly show that plaintiff's contract with the shipbuilder was not requisitioned.

If plaintiff's contentions should prevail, and this Court should hold (a) that the contract was, in fact and in law, requisitioned, and (b) that the just compensation for such requisition is the value of the contract at the date thereof, which is the same as the then value of the ship, which concededly was requisitioned, and (c) that plaintiff is entitled to interest upon such value from that date,—the United States will in this case be required to pay the plaintiff upwards of $975,000 additional, with interest for over six years. Furthermore, cases in which others have filed a brief as *amici curiae* involve several millions more, while the amount involved in other similar cases now pending in the Court of Claims is, as justly remarked by this Court in *Omnia Commercial Co.* v. *United States*, 261 U. S. 513, "appalling."

It is, therefore, important to note the intent of the Fleet Corporation, as evidenced by its action as the delegate of the President under the Act of June 15, 1917. This action completely negatives plaintiff's contention that its contract was requisitioned.

The order is explicit in its specification of the property requisitioned. While it refers to "contracts requisitioned" and to "ships and contracts taken over," the contracts referred to are clearly, from the context, the commitments (necessarily by contract) for the materials, etc.

It seems clear from the facts found that the Fleet Corporation had no intention of requisitioning the plaintiff's contract, and that both as matter of fact and of law it did not do so and that this was clearly understood by the plaintiff at the time. It does not appear from the

findings that the plaintiff then contended that its contract was requisitioned. On the contrary, it acquiesced in the requisition of the ship and furnished, as requested, a statement of the amounts which it had paid to the shipbuilder, in apparent reliance upon the intention of the Fleet Corporation to reimburse it for such expenditures.

While, by a subsequent contract of December 8, 1917, the United States, through the Fleet Corporation, agreed with the Shipbuilding Company that it should be credited under the terms of the construction contract then made with the amounts paid prior to August 3, 1917, by the plaintiff, these amounts of money were in no sense requisitioned from the shipbuilder, much less were they requisitioned from the plaintiff. As between the shipbuilder and the United States, the latter agreed to indemnify the shipbuilder against the claim of the plaintiff. As between the United States and the plaintiff, the former stated in the letter of August 28, 1917, that it was its intention to reimburse the plaintiff for all amounts paid by plaintiff to the shipbuilder as soon as such amounts should be ascertained. This intention was carried out by the Shipping Board when it made an award to the plaintiff of the moneys which it had actually paid to the shipbuilder, and in addition also for the increase in the value of materials assumed to have been purchased with these particular moneys; but it is clear that the United States did not requisition anything whatsoever from the plaintiff. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, distinguished.

This case is controlled by the decision of this Court in *Omnia Commercial Co.* v. *United States*, 261 U. S. 502. In that case, at the time of the requisition of the steel from the steel company, the plaintiff or its assignors had paid large sums to the steel company on account of the purchase of the steel and had sold the same to responsible parties, and from these sales would have realized a profit of nearly a million dollars.

If the action were maintainable on the theory of requisition of the plaintiff's contract, the judgment should be reversed and the claim dismissed, because at the date of the alleged requisition the contract was without value.

The amount of just compensation to which a plaintiff is entitled when his property is taken for public use is the market value of the property at the date of taking. The Court may properly take judicial notice of the historical fact that on August 3, 1917, or within a few days thereafter, every ship of over 2,500 deadweight tons capacity was requisitioned by the Fleet Corporation in behalf of the United States under the Act of June 15, 1917, by requisition orders substantially identical with the one issued to the shipbuilder in this case. Under these circumstances, it can hardly be properly contended that the contract had any market value, for it was a contract impossible of performance. It may be that if there had been a free market and the ship had then been completed, the ship would have had this value, but the Court of Claims does not find as a fact that the contract on the date of requisitioning of the ships was of any value.

The Court may, however, properly take judicial notice of the further historical fact that, at or about the time of the requisitioning of these ships, all shipbuilding material throughout the United States was likewise requisitioned by the Government, and particularly all steel and the entire steel industry were requisitioned, and no private shipbuilder was permitted to acquire any steel for shipbuilding for any but government ships. Assuming then merely for the argument that there is a basis for the plaintiff's contention that the shipbuilding contract was requisitioned, the contract at the date of requisition was valueless because it could not be performed by the shipbuilder. *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Pine Hill Co.* v. *United States*, 259 U. S. 191.

The theory of the plaintiff confounds the subject matter of the contract with the covenants of performance.

The court below erred in allowing interest (partly compounded) on the theory that the payments made by the plaintiff to the shipbuilder were requisitioned.

Mr. Charles S. Haight, Mr. T. M. Cunningham, Jr., Mr. William B. King, Mr. John J. Fitzgerald and *Mr. Wharton Poor,* by leave of Court, filed a brief as *amici curiae.*

Mr. Ira Jewell Williams, Mr. Carlos Berguido, Jr., Mr. John H. Stone, Mr. F. R. Foraker and *Mr. Francis Shunk Brown,* by leave of Court, filed a brief as *amici curiae.*

MR. JUSTICE BUTLER delivered the opinion of the Court.

This case arises out of the exertion of the power of requisition conferred on the President by c. 29, 40 Stat. 182, approved June 15, 1917, known as the Emergency Shipping Act.[1] There is involved the question whether

[1] "The President is hereby authorized and empowered . . .

"(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

"(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

"(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

"(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

a certain contract for the construction of a ship was requisitioned; and if it was, upon what basis is just compensation to be ascertained.

The act empowered the President (a) to order from any person for government use ships or ship material of kind and quantity usually produced by such person; (b) to requisition contracts for the building of ships; (c) to require the owner of any shipbuilding plant to place at the disposal of the United States the whole or any part of the output of the plant; (d) to requisition any shipbuilding plant or part thereof; (e) to requisition any ship in process of construction; and compliance with all orders issued under the act was made obligatory. By executive order of July 11, 1917, he delegated these powers to the United States Shipping Board Emergency Fleet Corporation. On August 3, 1917, the claimant was the assignee

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"(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. . . .

"Whenever the United States shall cancel, modify, suspend or requisition any contract, . . . it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: . . ."

and owner of a contract by which the New York Shipbuilding Corporation agreed to construct a ship, known as hull #193. The contract was made March 28, 1916; and after some modification, it provided for the construction of a ship of 8597 deadweight tons, to be completed and delivered on or before February 1, 1918. The contract price was $831,630.

Prior to August 3, 1917, the claimant or its assignor had secured the services of an architect, furnished plans and specifications to the builder, employed a bureau to inspect the work as it progressed, and had paid to the builder on account of the contract price instalments amounting to $419,500, which, with interest paid, architect's fees, and the value of the plans and specifications, amounted to $473,710.58, exclusive of the cost of inspection.

Immediately after the execution of the contract, the builder ordered all materials required, for which sufficient data then existed, and, before August 3, 1917, completed its orders for substantially all that were needed to perform the contract. Between 35 and 40 per cent. of the required materials had been delivered to the builder ready for use, and, on that date, the ship was about 19 per cent. completed. The Court of Claims found that all materials so ordered were delivered at the prices fixed in the orders and were used in the construction of the ship; and that nothing was purchased after that date, except materials used for construction, at a cost of $31,000, ordered for military protection. At that time claimant held on deposit in various solvent banks a sum of money sufficient to pay all the remaining instalments of the contract price; and the builder was ready and willing to perform the contract.

On August 3, 1917, the Emergency Fleet Corporation served on the builder its order and notice requisitioning all of the ships, including hull #193, under construction in

the builder's shipyard, and the materials necessary for their completion. The order required the builder to complete the ships. It stated that compensation would be paid for "ships, materials, and contracts requisitioned." The builder was required to furnish plans and specifications of the requisitioned ships, and a statement of the payments made and amounts still due, and other information "necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts."

On August 22, the Fleet Corporation caused its district officer to deliver to the builder a formal written notice which recited that the ships had been requisitioned, and that an order had been given the builder to complete them, and ordered the builder to "proceed . . . in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917 . . . "; and stated, "For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid: . . ." The builder accepted the order. The Fleet Corporation gave directions to the claimant not to make, and to the builder not to accept from claimant, any further payments on account of the contract.

On August 28, the Fleet Corporation notified the claimant that it had issued to the builder notice of requisition, and inclosed a copy. The letter advised that the Fleet Corporation's district officer had been authorized to take over claimant's inspection officers. It requested a verified statement of the payments made to the builder prior to requisition. It said: "It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if . . . such payments are found in order and in conformity with the contract requirements." It re-

quested a statement of indirect expenditures, such as the cost of superintendence, original design and interest on funds already paid, and said that the owner might submit any other matters deemed pertinent; that it presumed that it was addressing those entitled to receive compensation on account of the requisition of the vessels, and asked that there be included in claimant's answer "all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law."

On December 8, 1917, the Fleet Corporation made a contract with the builder and the American International Corporation relating to the completion and disposal of hull #193 and other ships requisitioned. It required the builder to complete the ship "in accordance with the specifications annexed to the respective contracts under which such hulls were being constructed for the former owners prior to August 3, 1917. . . ." It also provided that the Fleet Corporation should have credit for all sums theretofore received by the builder from former owners. The Fleet Corporation agreed to indemnify the builder from all loss or liability arising out of claims of the former owners occasioned by the requisition order, or any subsequent acts or orders.

January 23, 1920, the Fleet Corporation awarded claimant $442,683.82 as just compensation. It paid the builder for construction of the ship $412,130 which, added to the award, makes $854,813.82. This would be the total cost to it of the ship if its award as to compensation were accepted. The contract price was $831,630. The cost of construction for military protection was $31,000. The Court of Claims found that at the time of the requisition, the value of such ships was $200 per deadweight ton, and was the same on February 1, 1918. The Court of Claims also found that claimant had paid to the builder $239,500 in cash, $180,000 in notes, and $28,433.33 interest on notes,

making $447,933.33; and that it also paid architect's fees amounting to $5,500, and furnished plans and specifications of the value of $20,277.25, making in all $473,710.58. The amount of the award was unsatisfactory to claimant, and 75 per cent. of it, $332,012.87, was paid. The judgment was for $231,549.12.[2]

Both parties appeal.

Did the United States requisition claimant's contract?

The act of Congress conferred upon the President the power to take claimant's contract; and also to take the ship materials and the ship in process of construction. It required compliance with all orders issued under it. No question is raised or involved as to the obligation of the builder to comply with orders given it to complete the ship in accordance with the contract. It was ordered to do so, and it accepted the order. We are not here concerned with

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[2] Claimant paid out:

Architect's fees	$5,500.00
Cash to builder	239,500.00
Notes to builder	180,000.00
Interest on notes	28,433.33
Total	$453,433.33
Value of plans and specifications	20,277.25
	$473,710.58
Less 75 per cent. of award	332,012.87
Balance	$141,697.71

Interest was computed and allowed as follows:

On $473,710.58 minus $28,433.33, or $445,277.25, from August 3, 1917 (date of requisition) to February 24, 1920 (date of payment of 75 per cent. of award), $68,350.06.

On $445,277.25 minus $332,012.87, or $113,264.38, from February 24, 1920, to April 23, 1923 (date of judgment), $21,501.35.

Total of interest	$89,851.41
Added to	141,697.71
Produces amount of judgment	$231,549.12

its rights or obligations, but the orders given the builder show that expropriation of claimant's contract and rights was intended. By its orders the Fleet Corporation put itself in the shoes of claimant and took from claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had. The credit for, and advantages under the contract resulting from, payment of $419,500, made by claimant to builder were taken. The use of the plans and specifications for the construction of the ship as well as the benefit of inspection prior to the requisition date, August 3, 1917, were also taken over. The contract was not terminated. The direct and immediate result of the requisition orders and acts of the Fleet Corporation was to take from claimant its contract and its rights thereunder. Because of material ordered and furnished and work performed prior to requisition, the United States was enabled to obtain the ship earlier than it could have caused a like ship to have been planned and built, and secured the benefit of prices prevailing immediately after the making of the contract, when the builder ordered materials for the construction of the ship. At the time of requisition, costs were higher than the contract prices. At that time, and on February 1, 1918, the date fixed for completion, the value of such ships was greatly in excess of the contract price, and in excess of the amount awarded to claimant plus the amount paid by the Fleet Corporation to the builder.

Omnia Commercial Co. v. *United States,* 261 U. S. 502, does not support the contention that claimant's contract was not expropriated. There, claimant had a contract giving it an opportunity to purchase a large quantity of steel plate from a steel company at a price under the market. If the contract had been carried out, large profits would have resulted. Before any deliveries were made, the United States requisitioned the steel company's entire production of steel plate. No specific steel plate had been

appropriated to the contract, and no part of the purchase price had been paid. The action taken by the United States applied to the steel company only and created no relations with the claimant. The contract was not kept alive nor resorted to in order to determine anything involved in the transaction between the United States and the steel company; the benefit of the low prices was not taken; no payments made on account of the purchase price were taken; nothing belonging to the Omnia Company was taken. Damages claimed were held too remote. The differences between that case and this are essential and obvious.

The situation in this case is well stated in the dissenting opinion of the Chief Justice of the Court of Claims: "If the plaintiff had voluntarily assigned its contract with the builder to the Government, and the latter had expressly assumed the unfulfilled obligations and later received the completed vessel, it would not more effectively have acquired plaintiff's contract, its rights, and obligations than actually resulted from what was done in this case. The Government requisitioned the incomplete vessel with the purpose of requiring the completion in accordance with the existing contract; it did require the carrying out of that contract (with slight modification); it took plaintiff's right to have the vessel; it received the vessel and appropriated plaintiff's partial payments thereon to its own use and benefit."

It must be held that the claimant's contract, and its rights and interests thereunder, were expropriated.

Upon what basis is just compensation to be ascertained?

The expropriation enabled the Fleet Corporation to obtain the ship when completed by paying the builder the instalments of the contract price remaining unpaid at the time of the requisition. The builder was not entitled to more, because the Fleet Corporation took over the contract and succeeded to the rights of claimant.

The award by the Fleet Corporation was made up of two items: one was stated to be the "computed value" of material in the yard of the builder at the time of requisition, and the other the amount of progress payments "in excess of the cost of the materials requisitioned." The Court of Claims held that the materials were not the property of the claimant, but belonged to the builder, and should not have been taken into account in arriving at the compensation due the plaintiff. But we are of opinion that the amount of claimant's compensation did not depend upon the legal title to the materials during construction; that the progress payments did not constitute the amount claimant was entitled to have, and that the award was erroneous, because of failure to find the value of claimant's contract rights taken.

The judgment of the Court of Claims was based upon the assumption that the money paid by claimant in furtherance of planning and building the ship was expropriated. In the opinion, it is said, "And the plaintiff is entitled to recover the amounts of money requisitioned and appropriated by the United States." But plainly there was no requisition of money.

The United States contends that nothing whatever was requisitioned from the plaintiff, and that the judgment should be reversed and the claim dismissed unless claimant shall be held entitled to compensation for cancelation of its contract; and that, in such event, it should have judgment only for an amount sufficient with what already has been paid to it to make up "the amount actually invested in the ship taken."[3] As we hold that claimant's contract rights were expropriated, it is not necessary to consider what would be just compensation in case of mere cancelation of the contract.

[3] The figure contended for is $425,000, made up of $419,500, paid by claimant to builder, and $5,500, architect's fee. Nothing is included to cover the value of plans, interest or cost of inspection.

The contract rights of claimant taken are to be distinguished from its expenditures for the production of the ship. The value of property may be greater or less than its cost; and this is true of contract rights and other intangibles as well as of physical things. It is the property and not the cost of it that is protected by the Fifth Amendment. *Minnesota Rate Cases,* 230 U. S. 352, 454. By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the instalments remaining to be paid under the contract. It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340; *United States* v. *New River Collieries Co.,* 262 U. S. 341, 344; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 306; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 341. And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. *Seaboard Air Line Ry. Co.* v. *United States, supra; United States* v. *Benedict,* 261 U. S. 294, 298; *Brown* v. *United States,* 263 U. S. 78.

Claimant insists that just compensation is the value of the contract and its rights and interests thereunder, and is measured by the difference between the value of the ship, as found by the court, at the time of the taking and on the date specified for delivery, and the amount which claimant was then required under the contract to pay in order to get the ship.

We think it not permissible so to calculate compensation. It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably

could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy.

In re Mersey Docks and Admiralty Commissioners, [1920] 3 K. B. 223, is a case quite similar to this. There, the Admiralty requisitioned a barge nearing completion, altered her construction, and paid, or undertook to pay, the builder the original contract price. It was impossible for the Board, for whom the barge was being constructed, to replace her by another at a cost less than three times the contract price of the original barge. By agreement, the ascertainment of compensation to be paid by the Admiralty to the Board was referred to an arbitrator. The Board claimed the difference between the contract price and cost of replacing the barge, regard being had to the fact that replacement would be impossible for three years; and also claimed compensation for loss of services during the period required for replacement. The Admiralty contended that the measure of compensation should be the difference between the contract price and value of the vessel when taken. A special case was stated by the arbitrator. The Earl of Reading, Lord Chief Justice, gave judgment, and held that the Board was entitled to recover the difference between the contract price and the increased cost of replacing the barge; that the Board was not entitled to any compensation for loss of services, the damage being too remote. He said (p. 233): "On a broad view of the facts and without undue regard to minute details, the Court has to determine upon what principle the compensation to be awarded to the Board ought to be measured. In my judgment it is sufficient for the purpose of this case to say that the Board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1917, replaced by

the Admiralty. As it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labour and materials which has continued up to the present time. . . . I can see no very material difference between the respective principles contended for by counsel on behalf of the Board and counsel on behalf of the Admiralty. In truth I think that both these principles lead to the same conclusion."

This Court has held in many cases that replacement cost is to be considered in the ascertainment of value,[4] but that it is not necessarily the sole measure of or guide to value. We are of opinion that value, so far as material, rather than replacement cost should be taken into account, for the ascertainment of just compensation. If the ship had been complete and ready for delivery at the time of requisition, claimant's just compensation would be the value of the ship, less the unpaid balance of the contract price. But the ship was not ready, and the builder was not bound to deliver before February 1, 1918. Claimant had a right to its delivery at that time, and the builder was ready to perform the contract. The Court of Claims, being of opinion that claimant's contract was not taken, did not find its value at the time of taking, and failed to find facts from which such value appears. Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of

[4] *Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 287, and cases cited; *Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, 689; *Georgia Ry. & Power Co.* v. *Railroad Commission*, 262 U. S. 625, 629.

such ships at the time of requisition, and the then probable value at the time fixed for delivery, the contract price, the payments made and to be made, the time to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking (*Minnesota Rate Cases, supra,* 451; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 76; *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *Monongahela Navigation Co.* v. *United States, supra,* 343), that is, the sum which will put it in as good a position pecuniarily as it would have been in if its property had not been taken. *United States* v. *New River Collieries Co., supra,* 343; *Seaboard Air Line Ry. Co.* v. *United States, supra,* 305.

Reversed and remanded for further proceedings in conformity with this opinion.

MR. JUSTICE SUTHERLAND took no part in the consideration of this case.

The separate opinion of MR. JUSTICE McREYNOLDS.

This case is of special importance because of the immense sums involved in similar pending claims. Ten ships—some larger than No. 193—were requisitioned at Camden alone. Speaking with constraint, the findings of the Court of Claims leave much to be desired for ready understanding; but enough appears, I think, to support its final judgment.

Through change of name, the Brooks-Scanlon Corporation became successor to Carpenter-O'Brien Company and

party to the written contract of March 28, 1916, under which the New York Shipbuilding Corporation undertook to construct at its Camden yard a steamship of about eighty-five hundred tons (Freighter No. 193), according to designated plans, on or before February 1, 1918. $595,000, payable in installments, was the price first stated; prior to May 25, 1917, because of changes, this was increased to $811,130. The East Coast Transportation Company and the New York Shipbuilding Company were the original contracting parties. The Brooks-Scanlon Corporation acquired the former's interests—the New York Shipbuilding Corporation those of the latter.

The Act of Congress approved June 15, 1917, c. 29, 40 Stat. 182, provides: "The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

"(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person. (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material. (c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order. (d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant. (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now con-

structed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. . . .

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. . . .

"The cost of purchasing, requisitioning, or otherwise acquiring plants, material, charters, or ships now constructed or in the course of construction and the expediting of construction of ships thus under construction shall not exceed the sum of $250,000,000, exclusive of the cost of ships turned over to the Army and Navy. . . ."

July 11, 1917, the President delegated his powers granted by the statute, to the United States Shipping Board Emergency Fleet Corporation—the "Fleet Corporation." Purporting to act as thus authorized, and referring to ten vessels then under construction at the Camden Yard, the Fleet Corporation notified the New York Shipbuilding Corporation, August 3, 1917: "All power-driven cargo-carrying, and passenger ships above

2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States. On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch. The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned. You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts. You will report immediately whether any additional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation."

August 18, 1917, the Fleet Corporation addressed a letter to the East Coast Transportation Company (predecessor of Brooks-Scanlon Corporation) giving notice of the requisition-order of August 3rd, and on August 28, 1917, served on the Carpenter-O'Brien Company a substantially identical letter, which stated—

"On August 3, 1917, the United States Emergency Fleet Corporation issued to the New York Shipbuilding Corporation the notice or requisition set forth in enclosure 'a'.

"In response to this communication the New York Shipbuilding Corporation, the shipbuilders, informed us

that the East Coast Transportation Company, as owners, or representatives of owners, had entered into a contract with them for the following vessel:

"Hull No. 193; type, cargo; d. w. ton, 8,100; date of contract, 3–28–16 (assigned 5–24–17).

"Under date of August 23rd you advised that this contract had been assigned to you.

"The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. Will you please inform the district officer, Mr. G. R. McDermott, at room 302, 1319 F St. N. W., Washington, D. C., the names of your representatives and their compensation, sending a duplicate to this office. Your cooperation with the corporation is invited.

"The corporation will consider payments to the contractor accruing since the date of requisition, upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

"You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original vouchers and receipts and should be verified under oath by the proper corporate officer of your company.

"It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if after investigation of data submitted by you such payments are found in order and in conformity with the contract requirements.

"At your further and early convenience you are requested to submit to the corporation a statement of such

indirect expenditures as you have made on account of each vessel; for instance, the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

"It will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above. The corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

"The consummation of the orders herein and heretofore transmitted will be made the subject of later appropriate corporate action."

August 22, 1917, the Fleet Corporation, through General Manager Capps, forwarded the following letter to Agent McDermott; and, as directed, the latter promptly delivered a copy thereof to the New York Shipbuilding Corporation with request that it govern itself accordingly.

"Dear Sir:

"Referring to the vessels under construction in the yard of New York Shipbuilding Corporation, Camden, N. J., requisitioned under the corporation's order of August 3rd, precedent to the final examination of the contract for the vessels in question, you are requested to inform the shipbuilder as follows:

"The ships now under construction at your plant and referred to above having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States, and an order having been placed with you by due authority to complete the construction of said ships with all practicable dispatch, you

are further ordered by the President of the United States, represented by this corporation, to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification and survey thereof, including the meeting of the requirements of the said contract and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

"All work will proceed under the inspection of such persons as have been or may hereafter, from time to time, be designated by this corporation for that purpose.

"For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid: Provided, That on acceptance in writing of this order you agree that on final acceptance of the vessel to give a bill of sale to the United States in satisfactory form, conveying all your right, title, and interest in the vessel, together with your certificate that the vessel is free from liens, claims or equities, with the exception of those of the owner, and then only to those set forth in the contract. Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order.

"This order applies only to vessels actually under construction and in accepting it the corporation expects you to inform it of the actual stage of construction of each vessel or the part to be assembled therein on the date of requisitioning, August 3, 1917. The corporation reserves the right to decide whether or not a vessel was actually under construction on August 3, 1917, on consideration of the ascertained facts.

"In replying to this communication, please arrange to specify separately the vessels to which this order refers, and refer to the corresponding contract in sufficient terms for identification of it.

"Please furnish a copy of this to New York Shipbuilding Corp., and ask for an early reply.

Very truly yours,

W. L. CAPPS, General Manager."

Replying, September 20, 1917, the Shipbuilding Corporation advised the Emergency Fleet Corporation—

"Referring to the order dated August 22, 1917, made by United States Shipping Board Emergency Fleet Corporation, and delivered to this company, we beg to say:

"We understand that by the Act of Congress of June 15, 1917, entitled 'An Act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes,' and the Executive order dated July 11, 1917, made by the President with respect to said act, and transmitted to us by the Emergency Fleet Corporation under date of August 3, 1917, we are under obligation to comply with the order of the Emergency Fleet Corporation dated August 3, 1917, requisitioning ships at this company's plant.

"This corporation, therefore, accepts United States Shipping Board Emergency Fleet Corporation's order dated August 22, 1917, for the completion of the vessels under contract in this yard on August 3rd, 1917, known as hull No. —, and agrees that, upon the completion and acceptance of said vessels and upon complete payment [by] United States Shipping Board Emergency Fleet Corporation, together with such additional compensation as may be agreed upon, this company will execute and deliver to the United States of America a bill of sale conveying all this company's right, title, and interest in the vessels without prejudice to any claim of the person or corporation

who originally contracted for the construction of said vessels, and those claiming rights under such original contractor, together with our certificate that the vessels are free from liens, claims, or equities except such liens, claims, or equities as may be asserted by, or exist in favor of, the person or corporation who originally contracted for the construction of the vessels, and those claiming rights under such original contractor."

September 13, 1917, the Fleet Corporation telegraphed the Shipbuilding Corporation: "Do not accept further payment from former owners on account of requisitioned ships. This is mandatory."

December 8, 1917, the Shipbuilding Corporation and the Fleet Corporation agreed—

"On and prior to August 3, 1917, the Shipbuilding Corporation was constructing under private contract with the corporations named below (hereinafter called 'former owners') ships bearing the hull numbers of the type and for the contract prices set opposite their respective names. . . . [There were 10 of them.]

"Due to war conditions, such contract prices have proved and will prove to be less than the actual cost of constructing such ships. On August 3, 1917, all of such ships, together with the materials assembled therefor, were requisitioned by the Fleet Corporation, acting in accordance with the provisions of the Urgent Deficiency Act of June 15, 1917, and the Executive order of July 11, 1917. The Shipbuilding Corporation by such requisition was directed to complete such ships on behalf of the United States.

"The parties hereto desire to fix the just compensation to be paid to the Shipbuilding Corporation in accordance with the provisions of such Urgent Deficiency Act, and to that end the Fleet Corporation is willing to increase such contract prices. . . .

"The Fleet Corporation hereby agrees to pay to the Shipbuilding Corporation as just compensation for the

completion of said ten ships, hulls Nos. . . . the entire cost of construction of said ships, figured from the commencement by the Shipbuilding Corporation of the construction of said ten ships up to the times of completion thereof respectively, and in addition thereto with respect to each ship ten dollars ($10) per dead-weight ton for profit. There shall be credited, however, in favor of the Fleet Corporation all sums heretofore received by the Shipbuilding Corporation on account of the construction of such ten ships respectively, either from the former owners or from the Fleet Corporation."

The amended petition, filed June 12, 1920—prior to our decision of *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 513—and upon which the cause was tried, alleges—

"That said builder, the New York Shipbuilding Company, had, up to the 3d day of August, 1917, duly contracted for all of the materials, equipment and supplies sufficient to complete said ship as specified in said contract, and that a large portion of such material, equipment and supplies had been duly prepared and delivered to the yard of said builder on said day, and that the remainder thereof, sufficient to complete said ship, had been duly contracted for by said builder and was, thereafter, delivered under the provisions of said contracts and entered into the construction and completion of said ship; and that said builder had performed and caused to be performed a large amount of labor under said contract upon, in and about the construction of said ship, and that said builder had duly paid for said contracts for material, equipment and supplies, the delivery thereof, and for the labor furnished and performed in and about such construction by moneys so paid to said builder by said owner as herein stated; and that said builder, on the 3d day of August, 1917, on its part, had fully complied with the terms of said contract, and was then and was always thereafter

ready, able and willing to complete the same in all particulars. . . .

"That on June 15, 1917, by Chapter 29, 40th Statutes at Large, 182, Congress authorized the President, among other things to modify, suspend and cancel or requisition any existing or future contract for the building, production or purchase of ships or materials, etc., and further to purchase, requisition or take over the title to or the possession of, for use or operation by the United States, any ship then constructed or in the process of construction, or thereafter constructed, or any part thereof, or the charter of said ship. In further accordance with said act the President, by order dated July 11, 1917, deputed to the United States Shipping Board Emergency Fleet Corporation full power to act thereunder including the power to provide just compensation therefor, and the said corporation, by its order of August 3, 1917, on behalf of the United States, took over all the property of the claimant in or under said contract, including the said ship under construction and all materials, machinery, equipment, outfit and commitments therefor, and all labor performed thereon necessary for its completion, meaning thereby everything in existence and as expressed in said order 'required to complete the construction of said requisitioned ships under construction,' as will more fully appear by reference to the order of W. L. Capps, General Manager, which reads as follows. [Here follows copy of requisition-notice to the Shipbuilding Corporation dated August 3rd and enclosed in letter of August 28th addressed to Carpenter-O'Brien Company.] . . .

"That said requisition order was fully complied with and all of the property of said owner, the claimant herein, hereinbefore described, was taken by the said United States Shipping Board Emergency Fleet Corporation for and on behalf of the United States, and was thereafter retained by and used for the purposes of the United States

as provided by law. And that the said owner was thereby and thereafter deprived of all of its use and value. That said ship so taken was then under construction by said builder and thereafter was fully completed without change of plans or specifications from those set forth in the said construction contract as amended and supplemented, and that the said materials, equipment, outfit and supplies, and the said commitments and contracts for materials, equipment, outfit and supplies as described in said requisition order and paid for by the said owner and taken as aforesaid, were actually used in the construction and completion of said ship and were substantially sufficient to so construct, complete, equip and supply said ship as described in said plans and specifications as amended and supplemented. . . .

"That a fair and reasonable value of the said property so requisitioned and taken, and of which said owner was deprived on said 3d day of August, 1917, as aforesaid, was, at the rate of two hundred fifty dollars ($250) per ton for 8,597 dead weight tons, the sum of two million, one hundred forty-nine thousand, two hundred fifty dollars ($2,149,250) less the sum of four hundred twelve thousand, one hundred thirty dollars ($412,130) as aforesaid, (required to be paid by said owner to said builder under the provisions of said construction contract as amended and supplemented, in order to fully complete, supply and equip said ship in accordance with the terms and conditions of said construction contracts hereinbefore set forth), so that the total amount due to said claimant on the said 3d day of August, 1917, on account of the transactions hereinbefore set forth was the sum of one million, seven hundred thirty-seven thousand, one hundred twenty dollars ($1,737,120)."

The ship was finally completed and delivered September 20, 1918.

Departing from the theory of the complaint, petitioner now maintains that its right and interest in the shipbuild-

ing contract were expropriated by the United States for public use; that the contract itself was requisitioned, not frustrated; and that compensation must be made for the full value of the contract as of the date when so taken. The Court of Claims denied this demand, but held petitioner should receive the sum of partial payments which it made to the shipbuilder under the contract prior to the requisition order of August 3, 1917, with interest.

I can find no sufficient basis for holding that the Fleet Corporation expropriated the claimant's contract or intended so to do, or consciously assumed liability for the value thereof. Claimant never had either title to or possession of the vessel. It was only a responsible party to an executory contract for construction, always subject to frustration by condemnation of the vessel.

The order of August 3rd, addressed only to the Shipbuilding Corporation, plainly recites that "all power-driven cargo-carrying, and passenger ships above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States." On that date the Shipbuilding Corporation had possession of the ship as well as title thereto. The United States then assumed control and the immediate result was to frustrate the building contract. Frustration by the exercise of the power of eminent domain was an implied condition. The United States became liable to the owner—the Shipbuilding Corporation—for the value of property actually taken. What that value was we need not inquire; the builder accepted the requisition-order and the agreement of December 8th, and does not now seek to recover more.

Certainly, no notice concerning requisition went to the Brooks-Scanlon Corporation prior to the letters of August 18th and 28th, whereas the building contract had been frustrated by taking the ship on August 3rd.

The communication of August 22nd to the Shipbuilding Corporation referred to the vessels in the yard as having been "requisitioned under the corporation's order of August 3rd, precedent to the final examination of the contract for the vessels in question," and "title thereto taken over by the United States"; directed their completion in conformity with contract, etc., which existed on that date; and stated that "for the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid," with a certain important proviso.

On September 20th the Shipbuilding Corporation recognized that the ship had been requisitioned by the order of August 3rd and promised to complete upon payment of compensation named in original contract and "such additional compensation as may be agreed upon."

The telegram of September 13th referred to "requisitioned ships." The contract of December 8th recites that "on August 3, 1917, all of such ships, together with the materials assembled therefor, were requisitioned by the Fleet Corporation."

The notices addressed to East Coast Transportation Company and Carpenter-O'Brien Company, August 18th and 28th, indicate that on August 3rd the Fleet Corporation was unaware of the parties to or the terms of the building contract. These notices declared a purpose to "consider payments to the contractor accruing since the date of requisition," and an intention "to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder;" and further, "it will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above."

The reported facts seem inconsistent with any definite purpose by the Fleet Corporation to requisition the con-

tract, as distinguished from the vessel itself—certainly, there was no apparent reason for any such action. It expressed a purpose to reimburse for payments made under the building contract and to consider such sums when seeking to determine compensation for the shipbuilder. It also demanded that the builder should complete the vessel as provided by the contract. The builder acquiesced, and its rights are not now in controversy. The right of the claimant to reimbursement for the actual payments which it made under the contract prior to frustration is not challenged; it was properly considered in adjusting the sums to be paid to all parties. I can see no sufficient reason for awarding the value of a contract which perhaps might have been realized if the United States had not exercised their clear right to take over the partially completed vessel. No such claim was advanced by the petition; there was ample power in the Fleet Corporation to frustrate the building contract; and there seems no necessity for interpreting its action as accomplishing more. The Fleet Corporation evidently intended to requisition the vessel; and when claimant filed its petition in 1920 it does not seem to have thought the contract had been requisitioned. A few vague and general words used in the hurry of the times and without full information ought not to place an enormous, wholly unnecessary and unanticipated burden on the public treasury.

The amended petition upon which the cause was tried proceeds upon the theory that claimant was *owner* of the vessel; that prior to August 3, 1917, the builder had duly contracted for all necessary material and supplies to complete the ship, performed much labor thereon, and had paid for all these things out of moneys received from the *owner*. It distinctly alleges: That the Fleet Corporation, "by its order of August 3, 1917, on behalf of the United States, took over all the property of the claimant in or under said contract, including the said ship under con-

struction and all materials, machinery, equipment, outfit and commitments therefor, and all labor performed thereon necessary for its completion, meaning thereby everything in existence and as expressed in said order 'required to complete the construction of said requisitioned ships under construction.' . . . That said requisition order was fully complied with and all of the property of said owner, the claimant herein, hereinbefore described, was taken by the said United States Shipping Board Emergency Fleet Corporation for and on behalf of the United States, and was thereafter retained by and used for the purposes of the United States as provided by law."

The court below—rightly, I think—declared: "The intent and purpose of the Shipping Board was, therefore, to requisition ships under construction, which was done in unmistakable language. It is admitted that the ships under construction, the materials, and so forth in the yard of the New York Shipbuilding Corporation were the property of that corporation, and the title to that property was in the Shipbuilding Corporation alone. Among the ships under construction so requisitioned was hull 193, which the Shipbuilding Corporation was building for the Carpenter-O'Brien Corporation, but it is not contended by the plaintiff that it had any title to or interest in said ship or the materials for its completion. All the interest it had was the right to the delivery of the ship when it should be completed. It follows that the United States did not take or requisition the ship or materials from the Carpenter-O'Brien Corporation nor did the United States take over or requisition the contract which the Carpenter-O'Brien Corporation had with the Shipbuilding Corporation.

"It was made plain to the Carpenter-O'Brien Corporation that the United States did not intend to requisition the contract, for on August 28, 1917, after notifying the

Carpenter-O'Brien Corporation that it had taken over and requisitioned this ship from the Shipbuilding Corporation, the Shipping Board by letter of that date stated what its intention was. A copy of said letter is set forth in full in Finding VI. As further evidence showing the intention of the Shipping Board, reference is made to the letter of the board to G. R. McDermott, its officer, and which was communicated to the Shipbuilding Corporation. A copy of this letter is set forth in Finding VIII. And as final evidence that the United States did not requisition the contract, and never intended to, the United States entered into a contract with the Shipbuilding Corporation for the completion of all ships under construction in its yard, included in which ships was hull 193, thereby making its own contract for the completion of this ship. This contract is set out in Finding XVI. It is true that the plaintiff by reason of the requisitioning of the ship by the United States was deprived of the right to have delivered to it the ship when completed.

"But there has been in this case no direct taking of the contract. The injury inflicted upon the plaintiff is a consequential injury resulting from the exercise of a lawful power in the requisitioning of the ship under construction. The requisitioning has worked indirectly harm and loss to the plaintiff, but not such harm and loss as can be held to obligate the Government to pay for it. The action of the Government may have destroyed the worth of the contract, but the law affords no remedy. The Government by requisitioning the subject matter of the contract does not thereby take the contract. The subject matter in this case was the ship under construction, and that was what the Government requisitioned, not the contract which was the agreement and obligation to perform. The performance of the contract in this case was frustrated and not appropriated. 'Frustration and appropriation are essentially different things.' *Omnia Commercial Company* v. *United States*," *supra*.

The principles involved have been so recently discussed in *Omnia Commercial Co.* v. *United States,* that it seems unnecessary to restate them. We there said: "In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government. The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things."

The evidence fails to show any definite purpose by the Fleet Corporation to requisition the contract. Up to the time of instituting suit the claimant evidently was unaware of any such requisition. And it seems to me clear enough that the court below rightly concluded that the demand now advanced is without merit.

MR. JUSTICE SANFORD concurs in this opinion.